



OCT 26 2012

SUPREME COURT  
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## Advisory Committee on the Code of Judicial Conduct

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

October 2, 2012

[REDACTED]

**Re: Judicial Advisory Opinion No. 12-09**

Dear [REDACTED]

You have inquired of the Advisory Committee on the Code of Judicial Conduct whether you may participate with other balloon enthusiasts in a limited liability corporation formed under the Limited Liability Company Act, NMSA 1978, § 53-19-1 to -74 (1993, as amended through 2003) (the Act). You are concerned that your conduct might violate Rule 21-311(B) NMRA of the New Mexico Code of Judicial Conduct, which provides that a “judge shall not serve as an officer, director, manager, general partner, advisor, or employee of any business entity[.]”

As you have detailed the facts, the members of the LLC would consist of ten people including yourself, and, through the LLC, you would buy a balloon to make it available to members of the LLC. The ten of you would take turns flying the balloon. Each member would pay an equal portion of the fixed costs of the balloon, as well as an additional amount when the member takes up the balloon. The LLC would not be organized for profit and would not engage in commerce of any sort, except incidentally to allowing its members access to the balloon.

The Committee does not believe that the intent of the Code prohibits your participation in the LLC. Although Rule 21-311(A) appears to state a clear

prohibition, your inquiry raises the question of whether it applies to a LLC that does not operate for a profit. The Act is broad and does not limit a LLC to for-profit entities. See § 53-19-6 (“A limited liability company may conduct or promote any lawful business or purpose.”).

The Committee believes that the Code intends the definition of “business” to be similar to the one stated in Black’s Law Dictionary 226 (9th ed. 2009).

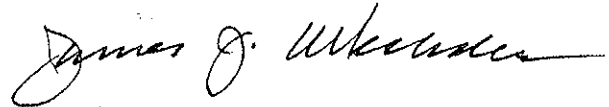
1. A commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain. 2. Commercial enterprises <business and academia often have congruent aims>. 3. Commercial transactions <the company has never done business in Louisiana>. See doing business. 4. By extension, transactions or matters of a noncommercial nature <the courts’ criminal business occasionally overshadows its civil business>. 5. *Parliamentary law*. The matters that come before a deliberative assembly for its consideration and action, or for its information with a view to possible action in the future. In senses 2, 3, and 4, the word is used in a collective meaning.

Although the Committee notes the extended definition that includes non-commercial activity, it does not believe that the Code contemplates the prohibition of that type of activity, which, by its very nature, is extremely broad. The underlying purpose of Rule 21-311 is indicated in Subsection C, which prohibits judges from participating in any financial activities that will interfere with the proper performance of judicial duties, lead to frequent disqualification of the judge, involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court, be reasonably perceived to exploit the judge’s judicial position, or result in other violation of the Code.

Because of its intended activities and manner of operation, the LLC you have described appears to be a conduit for recreational activity rather than for any business. The Committee thus views your activity as involving a club that facilitates your activities as balloon enthusiasts, not a business entity, even if it would be organized as a LLC for the convenience of the participants. Indeed, membership in this LLC is not substantively different from that in a golf club that makes recreational facilities available exclusively to its members.

You do not describe facts that would appear to involve the prohibitions contained in Rule 21-311(C). However, the Committee cautions that if your participation in the LLC raises any of these issues, such as if any of the other members of the LLC are lawyers who may appear in your court, you would not be able to participate in the LLC.

Very truly yours,



James J. Wechsler  
Chair

JJW:ow

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