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Advisory Committee on the Code of Judicial Conduct

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

October 22, 2012


Re: Judicial Advisory Opinion No. 12-10

Dear 

You have asked two questions of the Advisory Committee on the Code of Judicial Conduct that the Committee addresses concerning whether the Code of Judicial Conduct permits you to engage in extra-judicial activity while serving as a probate judge: (1) whether you may be employed by the State of New Mexico; and (2) whether you may volunteer with the reserve program in your county's sheriff's office.

The Code of Judicial Conduct applies to all judges of the State of New Mexico. Code of Judicial Conduct, Application, Section I(B). However, various provisions of the Code do not apply to part-time judges or only apply to part-time judges "while they are serving as judges." *Id.* § I(A). A probate judge is a "continuing part-time judge" within the Code because a probate judge "serves repeatedly on a part-time basis by election." *Id.* § II. A continuing part-time judge is not required to comply with Rule 21-304 NMRA, restricting a judge's appointment to governmental positions.

Rule 21-304(A) provides in part that a "judge shall not accept appointment to a governmental committee, board, commission, or other governmental position,

unless it is required by law, or is one that concerns the law, the legal system, or the administration of justice.”

The Committee interprets the language “other governmental position” to include both the employment and volunteer service that you are considering. *Cf.* NMSA 1978, § 10-9-3(D) (1961) (defining “position” under the Personnel Act as “any state office, job, or position of employment”). Thus, because Rule 21-304 does not apply to a continuing part-time judge, as a general matter, a probate judge may either accept employment with the state or volunteer for county service. However, other provisions of the Code do apply to continuing part-time judges and nevertheless constrain such employment or service.

Of particular relevance to your questions is Rule 21-301(A) NMRA, which prohibits a judge from engaging in extra-judicial activities that “will interfere with the proper performance of the judge’s judicial duties.” Because the proper performance of your judicial duties is paramount, you would not be able to accept a governmental position that would impair your activity to maintain regular and predictable hours to perform your duties as probate judge. *See* Advisory Opinion 07-02 (advising that the previous code permitted a probate judge to accept the position of municipal police chief provided that, *inter alia*, the judge maintained “regular and predictable hours to ensure that the public is aware of the judge’s availability”).

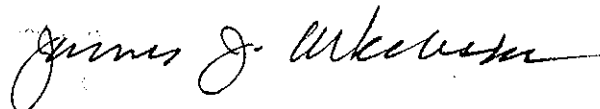
In addition, Rule 21-301 (B) and (C) prohibits a judge from engaging in extra-judicial activities that will lead to frequent disqualification of the judge or would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality. You have not described the type of governmental employment you may consider or the activities involved as a reserve with the sheriff’s office. However, if the activities involved in either type position raise either of these prohibitions, you would not be able to accept the position.

Further, we note that, under Rule 21-301, in carrying out any activities in any non-judicial governmental position, the Code does not permit you to

- 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.

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

Advisory Committee on the Code of Judicial Conduct

Hon. James J. Wechsler, Chair
Hon. Marie A. Baca
Hon. Kevin L. Fitzwater
Paul L. Biderman, Esq.
Prof. Robert L. Schwartz

January 23, 2007

Re: Judicial Advisory Opinion No. 07-02

Dear Judge,

You have asked the Advisory Committee on the Code of Judicial Conduct for advice on whether you can accept a position as a municipal chief of police, while simultaneously serving as a part-time probate judge. The Committee believes that, so long as certain conditions are satisfied, your service in both positions will not violate the Code of Judicial Conduct, Rule 21-001 NMRA.

Our opinion relies on the fact that your judicial service is that of a part-time probate judge, with jurisdiction solely over uncontested probate proceedings, and in a county with limited case activity. The Code contemplates that a probate judge may hold other employment. Rule 21-901(C) NMRA. Since your jurisdiction as a probate judge does not encompass criminal cases or civil cases generally involving the city you will serve, there is no inherent conflict with your service in a law enforcement capacity. In this respect, we distinguish your situation from that of a municipal judge having jurisdiction over criminal cases and taking a job in law enforcement, as in Judicial Advisory Opinion No. 95-01. Of course, you must avoid any conflict if particular circumstances give rise to one.

The Code of Judicial Conduct generally limits the ability of judges to accept appointment to other governmental positions in Rule 21-500(C)(2) NMRA, but probate judges are exempted from that limitation by Rule 21-901(C) (1) (b). There are, however, other general provisions that you must consider to ensure that your holding of both positions complies with the ethical requirements of the Code.

First, we call to your attention the requirements of Rule 21-500(H):

Conflicting compensated activities. 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. (Emphasis added.)

Under this provision, should you accept the position of chief of police, you could only do

so on condition that you set aside sufficient time to maintain the necessary office hours for your service as probate judge. In this regard, the Committee relies on your advice that the probate case activity in your county is minimal, enabling you to arrange your shifts and work as police chief to allow you to perform your duties as probate judge separate from any other responsibilities. Nevertheless, the Committee strongly suggests that a judge needs to maintain regular and predictable hours to ensure that the public is aware of the judge's availability. Additionally, as stated in Rule 21-500(H), your services as probate judge cannot be performed simultaneously with your work as chief of police. You would have to assess whether this requirement might interfere with your ability to perform your responsibilities as chief of police, including your ability to respond to emergency situations.

Another general provision of the Code that you should consider would determine whether your interest as head of the city police force might put you in conflict with your adjudication of debts owed by an estate. You might find that the city that you work for has claims against some of the estates that you are called upon to adjudicate. If the financial viability of your department would be materially affected by such claims, you would be placed in a conflict situation requiring you to recuse from the case under Rule 21-400(A)(3), (5) NMRA. Were such claims rare or uncontested, or their impact on your administrative role as police chief *de minimis*, you would not be required to recuse yourself. But if such claims were to arise with sufficient frequency in your court to require repeated recusal, that circumstance would indicate that you should choose between your judicial and law enforcement duties.

We note in this regard the constraint of Rule 21-500(D):

- (1) A judge shall not engage in financial and business dealings that:
 -
 - (b) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

While this provision does not strictly contemplate public service, we believe that the message is clear: a judge may not put himself or herself in a situation in which the judge's financial interest so frequently comes into conflict with judicial duties that the judge cannot fulfill the obligations of the judicial position.

Apart from these general constraints and subject to your assessment as to your ability to perform your responsibilities as chief of police without interference due to your probate judge responsibilities, we do not see that your acceptance of the position of chief of police for your city while serving as part-time probate judge for your county would violate the Code of Judicial Conduct.

Very truly yours,

James J. Wechsler
Chair

JJW:ow

cc: Hon. Marie Baca
Hon. Kevin Fitzwater
Paul L. Biderman, IPL Director
Professor Robert L. Schwartz