Advisory Committee on the Code of Judicial Conduct

December 3, 2012

[redacted]

Re: Judicial Advisory Opinion No. 12-14

Dear [redacted]

You have recently assumed your position as district judge and have questions for the Advisory Committee on the Code of Judicial Conduct concerning the closing of your law practice. You were a solo practitioner. The Committee responds to your specific questions in turn.

1. Fee to be received in personal injury case - You are expecting a settlement check from two insurance companies to settle a personal injury case. The check will be made payable to both you and your client. You inquire whether your assistant may meet with your client for your client to sign the check and whether you may then process the check through your trust account.

If the circumstances so require, a judge may continue to receive fees for legal services rendered prior to assuming judicial office. If the newly-appointed judge practiced in a law firm that continues after the judge's assuming judicial office, the administrative issues are not an issue; the firm fulfills that responsibility. In the context of a law firm, there is no difficulty receiving and disbursing funds for services

previously rendered. The Committee does not believe that you should be in a different position because you were a solo practitioner and have to personally bear these administrative responsibilities. You therefore may delegate them to an assistant. As to your trust account, the Rules Governing Discipline require attorneys to maintain complete records concerning the receipt and disbursement of funds on behalf of a client. Rule 17-204(A) NMRA. Even though you are now a judge, you must maintain the records for all activity of your prior clients. The Committee thus believes that you must use your previously-established trust account to finalize this case.

2. Transfer of other personal injury cases - With the exception of one case that we will address below, you have transferred all of your outstanding contingent fee, personal injury cases to a single attorney. The cases are at various stages of preparation. You and the attorney will distribute attorney fees without additional cost to the clients.

You may receive compensation for contingency fee cases that were pending when you assumed office, provided that (a) the percentage you receive is reasonably related to the work that you performed on the case, and (b) the contingency arrangement is proper under the Rules of Professional Conduct. *See* Cynthia Grey, *Ethical Issues for New Judges, American Judicature Society* (1996). It is best if you and the attorney agree to a fixed percentage when you transfer the case. *Id.* You have asked whether the Committee must approve the distribution of fees. The Committee need not take such action, and we assume that, after full disclosure, you have received the clients' consent to the transfer and have, or will, receive consent concerning the fee arrangement.

3. Notification of insurance companies regarding new attorney - You have not yet finalized letters to insurance companies informing them that the attorney who will be handling your personal injury cases is now the attorney of record. You ask whether you can send such letters on your old attorney letterhead or send them on modified letterhead. If the new attorney is now attorney of record, the Committee recommends that the new attorney send this communication to the insurance companies.

4. Personal injury case for which you have not received instructions from client - The last of your personal injury cases involves a minor. You have spoken

with the minor's father about transferring the case to another attorney, but the father has not provided a response to you as he had promised. You inquire whether you can send a follow-up letter to the father or give the file to the attorney who is taking your other personal injury cases to send a follow-up letter to the father.

The Committee agrees that a follow-up communication to the father is appropriate. Because the father has not consented to the transfer of the case to the other attorney, you would be the one to make the contact. If you chose to do so by letter, the Committee believes that you should modify your letterhead to remove any reference to you as an attorney in order to avoid any appearance that you continue to practice law. Further, the Committee notes that under the Rules of Professional Conduct, an attorney terminating representation must "take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred." Rule 16-116(D) NMRA. If you do not receive any response from father, you may wish to return to father all papers, property, and fees or expenses that have not been earned or incurred.

5. Appointment of substitute guardian ad litem - You continue to be listed as a guardian ad litem in pending cases despite your efforts to have parties file a motion to substitute for you before you took office. You ask whether you can file motions concerning the need for a replacement or whether you need to have another attorney file such motions.

The Committee does not believe that you should take either such action. The former involves your continued practice of law. The latter requires you to involve another attorney. As a judge, you do not want to take any action that may give the appearance of your lack of impartiality if the attorney you ask then appears before you. *See* Rule 21-102 NMRA ("A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary[.]"). The Committee believes that you can most effectively provide notice of the need for substitution by writing a letter to the courts in the cases in which you are still listed as a guardian ad litem, with copies to counsel. Because it concerns court business, you may do so using your court letterhead.

6. Court monitor case - You were appointed as a court monitor of a case for

a child who is now sixteen years old. The case is closed and no longer active. You are concerned that if you file something in the case, it would trigger action that would put the child at risk.

The Committee does not fully understand the circumstances of this case. If it is closed and inactive as you describe, the Committee does not believe that you need to take any action. On the other hand, if it is a pending proceeding that requires a court monitor to protect the child, you must take action to ensure that the court appoints a court monitor. If action is required, a letter similar to that described in connection with a substitute guardian ad litem would be appropriate.

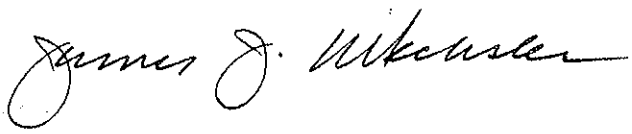
7. Custody cases - You have previously represented clients in custody cases that are now inactive and closed. You have sent letters to some, but not all, of these clients to inform them of your new status. You inquire whether you may continue to write to the remainder of the clients using your attorney letterhead, or, alternatively, whether your assistant may write to these clients.

To the extent that you have the obligation to communicate with these clients, the Committee believes that you, not your assistant, should do so. As we have discussed, in taking such action, to avoid any appearance that you continue to practice law, you should remove any reference to your being an attorney from the letterhead. Of course, you may discuss the nature of your previous relationship with the client in the content of the letter.

8. Banking, check writing, and other logistics - You own your own office and have advised that you will instruct the bank to change the name on your bank account related to the office to remove the words "attorney at law." You ask, however, whether you may continue to use your present checks.

The Committee advises that you should not. Rather, if the timing requires you to use the present checks, you can strike the reference to your being an attorney. You also ask whether you may continue to use your client trust account entitled, "[redacted] Attorney at Law, IOLTA Account" for trust account purposes until you have completed a final accounting. Because of the nature of the trust account, you may use it unmodified through the final accounting.

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