



Advisory Committee on the Code of Judicial Conduct

Hon. James J. Wechsler, Chair

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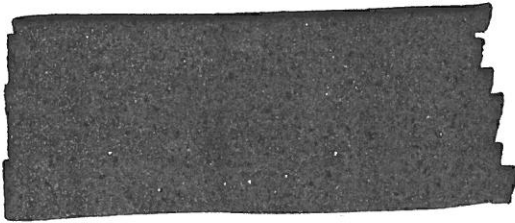
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Paul L. Biderman, Esq.

Prof. Robert L. Schwartz

Hon. Freddie Romero

October 30, 2013



Re: Judicial Advisory Opinion No. 13-11

Dear [REDACTED]

You are the only district judge in a relatively unpopulated county. Before your assuming judicial service five years ago, you operated a private law practice in an office building that you own. You have had the building on the market for four and one-half years without a sale. A statewide medical service provider has expressed an interest in leasing the building to house a parent assistance program.

As you understand the program, it is designed to develop and enhance parenting skills. Program representatives make home visits, teach appropriate behaviors, discourage inappropriate behaviors, and attempt to develop successful parenting strategies. It currently has thirty to forty family clients in your county, and it intends to expand. It is not clear whether a competitive service will continue to be offered.

You have asked the Advisory Committee on the Code of Judicial Conduct whether the Code of Judicial Conduct permits you to enter into the lease. Specifically, you point out that you handle abuse and neglect cases, and often the respondents in those cases are ordered to take parenting classes. Currently, the program provides service in two or three of those cases. In abuse and neglect cases, although perhaps once each year you have heard testimony from case workers of the Children, Youth and Families Department (CYFD) regarding a parent's participation in parenting classes, you have never had a parenting class provider testify at any hearing. In custody cases, a provider has testified in a custody case concerning whether a party has completed parenting classes and/or did so effectively on perhaps one or two occasions in your judicial tenure.

The Code of Judicial Conduct addresses the financial or business activities of a judge in Rule 21-311 NMRA. Under the rule, a judge may manage the judge's investments subject to certain prohibitions. Rule 21-311(A), (C). The prohibitions relevant to your inquiry preclude a judge from engaging in financial or business activity that: "will lead to frequent disqualification of the judge;" "will involve the judge in . . . continuing business relationships with lawyers or other persons likely to come before the" judge's court; or "may reasonably be perceived to exploit the judge's judicial position[.]" Rule 21-311(C)(2), (3), (4).


It does not appear from the facts that you have presented that the lease would lead to frequent disqualifications. Assuming that any participation of a program representative would require your disqualification, you have reported that there have been only approximately six or seven cases involving a witness from any parenting program in your court in the five years of your tenure. Particularly in view of the fact that you are the only judge in your county, the Committee does not believe that this number raises an issue of frequency. The Committee notes that, as the presiding judge in abuse and neglect case, you have the authority to refer parties for parenting services. Although CYFD makes the designation of a provider in compliance with such an referral, the question could arise as to whether you were unreasonably making such referrals in order to generate revenue for the program that leases from you. The Committee, however, considers this to be de minimis in view of the limited number of referrals that have been made in the past. Of course, you should avoid any such appearance and take note of any increase in referrals.

The issue of a continuing business relationship is more complex. A lease by its nature is a continuing relationship. Thus, you will at least technically have a continuing relationship with an entity that is legally recognized as a person under Rule 21-311(C)(3). The Committee believes, however, that because the lease relationship you describe presents only minimal potential problems when considering other attendant circumstances. First, as you have stated, your lease would not be directly with the program but with the statewide organization that offers the program as one of its many projects. In this regard, you have advised the Committee that you will not have direct dealings with the program providers concerning the lease in that your contact will be with the administrative offices of the statewide organization located in your county. Second, the nature of the program's appearance in your court is also a factor. The program does not appear as a party, and its providers appear as witnesses on issues that do not appear to be only indirectly related to the substantive issues in the case. Third, as previously discussed, the program's providers appear as witnesses on an infrequent basis.

The Committee understands that the purpose of Rule 21-311(C)(3) is to avoid any actual or apparent bias (or prejudice) if a party or witness with whom a judge has a continuing business relationship appears before the judge. Indeed, even if the judge could fairly decide the issues in the case, a reasonable inference could be drawn that the judge would favor such a party or witness. As to actual bias, you have indicated that, for the reasons discussed, you would have none, and the Committee does not view the circumstances as creating an actual bias. As to an appearance of a bias, the Committee believes that, based on the minimal nature of the potential problems, a technical application of the rule would not be appropriate. Rather, the Committee believes that the intent of the rule is fulfilled if, in the infrequent occasions when a program provider may appear as a witness in a case in your court, you follow the procedures of Rule 21-211(C) NMRA and, on the record,

disclose to the parties your lease relationship and permit them to determine outside of your presence whether to waive your disqualification.

Very truly yours,


James J. Wechsler
Chair

cc: Paul L. Biderman, Esq.
Professor Robert L. Schwartz
Hon. Freddie J. Romero