



Advisory Committee on the Code of Judicial Conduct

Hon. James J. Wechsler, Chair

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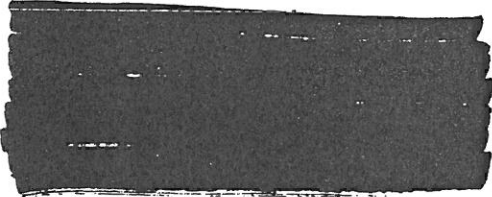
Paul L. Biderman, Esq.

Prof. Robert L. Schwartz

Hon. Freddie J. Romero

Hon. Sandra W. Engel

October 28, 2014



Re: Judicial Advisory Opinion No. 14-07

Dear 

You are a recently-appointed district judge in a district that includes four counties. Immediately prior to your appointment, you served as a deputy district attorney assigned to one of those counties. In that capacity, you had supervisory authority for the cases prosecuted by the office of the district attorney in that county. In addition, you were assigned cases in two of the other counties when there was the need for a prosecutor to handle the cases. Although you appeared in those cases, you did not exercise any supervisory role.

You have asked the Advisory Committee on the Code of Judicial Conduct whether the Code of Judicial Conduct requires you to disqualify yourself in cases filed by the office of the district attorney in the counties of your district for which you did not exercise supervisory authority. You have explained that you have disqualified yourself in all criminal cases in the county for which you had supervisory authority as well as any case in which you were either assigned as the prosecutor or took any action.

Rule 21-211(A) NMRA requires a judge to disqualify himself or herself "in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

- (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

...

(5) The judge:

(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during the association; [or]

(b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding

Your inquiry does not directly raise a question about Rule 21-211(A)(1), and the Committee assumes that if you have any personal bias or prejudice or personal knowledge of facts that would require your disqualification, that you would disqualify yourself. Rather, your inquiry focuses on Rule 21-211(A)(5), in particular subsection (b) because of your governmental employment as a deputy district attorney.

Under Rule 21-211(A)(5)(b), you are required to disqualify yourself in any case in which you “participated personally and substantially.” Such a case would include any case in which you acted either as the prosecutor or in a supervisory capacity.

The Committee does not believe, however, that Rule 21-211(A)(5) requires your disqualification in cases in which you did not participate either directly or in a supervisory capacity merely because you were associated with other lawyers in the office of the district attorney who were substantially prosecuting the cases while you were a deputy district attorney. The Committee interprets Rule 21-211(A)(5) to address judges who served in governmental employment separately in subsection (b), such that they do not also fall within subsection (a) that would apply to other types of lawyer associations. See Charles Gardner Geyh, James J. Alfini, Steven Lubet & Jeffrey Shaman, *Judicial Conduct and Ethics*, § 4.14[2] at 4-59 (5th ed. 2013) (stating that the language of the 2007 Model Code, which is the same language of Rule 21-211(A)(5)(b), “is consistent with precedent where courts had exhibited reluctance to disqualify judges from cases in which their former governmental agencies appeared as counsel, even when the matter was pending within the agency when the judge left—provided that the judge was not personally involved”).

In summary, it is the opinion of the Committee that Rule 21-211(A) does not require your disqualification in cases involving the office of the district attorney in which you did not personally participate or act in a supervisory capacity.

Very truly yours,



James J. Wechsler

Chair

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