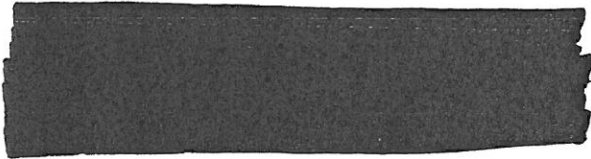




Advisory Committee on the Code of Judicial Conduct

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

December 11, 2014



Re: Judicial Advisory Opinion No. 14-09

Dear 

You were appointed as a magistrate judge in May and elected to your position in November. Your court has two divisions located in separate towns, each with a single judge. You have requested an opinion from the Advisory Committee on the Code of Judicial Conduct as to the manner in which you should handle potential conflicts of interest that may arise because your husband appears as a compliance officer in cases in your division.

Compliance officers supervise defendants ordered to serve probation by the court. Your husband has held his position for twelve years. He is not, however, a public employee. Rather, he works with another compliance officer who contracts directly with the county to operate the compliance office for your court. The other compliance officer operates a sole proprietorship that the county pays a certain amount for each case handled. He and your husband divide equally the contractual revenues. The other compliance officer currently serves the other division of your court.

The operative provisions of the Code responsive to your inquiry are contained in Rule 21-211(A) NMRA relating to disqualification. In particular, that Rule 21-211(A) provides:

A. A judge shall 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:

(2) The judge knows that . . . the judge's spouse . . . is:

(d) likely to be a material witness in the proceeding.

The Committee believes that your husband's participation in a proceeding, whether by report or testimony, falls within this provision such that you must disqualify yourself.

You have advised the Committee that in such proceedings you have been informing the parties about your disqualification, and the parties have waived it. Rule 21-211(C) permits a judge subject to disqualification in circumstances such as these to “disclose on the record the basis of the judge’s disqualification and . . . ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification.” If the parties agree to such a remittal of disqualification, their agreement must be “incorporated into the record of the proceeding.”

Although remittal of disqualification permits a judge to participate in proceedings in which the judges would otherwise be disqualified, and has permitted you to participate in proceedings in which your husband was involved, it is an imperfect solution to your circumstances. You have informed the Committee that your husband is the only compliance officer assigned to your division. He would thus be assigned to every case requiring a probation officer. You thus have a structural conflict. The Committee does not believe that you may continue a structural conflict and attempt to address it on an ad hoc basis through remittal.

You have additionally inquired as to whether your disqualification may be resolved if your husband worked in the other division of your court, and the other compliance officer worked in your division. This arrangement also is problematic under the Code. Rule 21-211(A)(2)(c) provides that a judge shall disqualify himself or herself if the judge knows that the judge’s spouse “has more than a de minimis interest that could be substantially affected by the proceeding.” Because your husband shares in the revenues under the county contract, he has a financial interest in every case in which a compliance officer acts, regardless of whether he or the other compliance officer works on the case. Although the payment for compliance officer services may not be substantially affected by the outcome of any case, the continued contractual relationship with the county would, at least apparently, depend on the performance of the compliance officers. The Committee therefore believes that your presiding over cases in which your husband receives a financial benefit gives rise to an appearance that affects your impartiality.

Given the structural conflict that exists because of your husband’s position as a compliance officer and his financial interest in the cases that may come before you, the Committee believes that you are disqualified from all cases with compliance officer involvement. The Committee suggests that you resolve this conflict on a permanent basis by ensuring that your husband does not participate in cases over which you preside and does not benefit from a contractual relationship with the compliance officer who does participate in such cases. The Committee further suggests that a sixty-day period to resolve the conflict is reasonable and practicable. *Cf.* Comment 2, Rule 21-311 NMRA (“As soon as is practicable without serious financial detriment, the judge must divest himself or herself of investments and other financial interests that might require frequent disqualification . . .”). In the interim, the Committee believes that you may continue to use the remittal procedure.

Very truly yours,



James J. Wechsler
Chair

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