



Advisory Committee on the Code of Judicial Conduct

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Supreme Court Law Library
Santa Fe, New Mexico

Re: Judicial Advisory Opinion No. 18-02

Dear [REDACTED]

You are a retired judge. Under an annual professional services agreement, you serve as a judge pro tempore for the court on which you previously served. The Court calls upon you to sit approximately four days per month. You have also been asked to serve as a hearing officer for a state agency and have considered acting as a mediator or arbitrator or engaging in the practice of law. You have asked the Advisory Committee on the Code of Judicial Conduct whether the Code of Judicial Conduct permits you to perform these other tasks for compensation while you are serving as a judge pro tempore.

Although the Code does not specifically address whether you may serve as a hearing officer, it does address the other activities you describe. We will first turn to these activities.

The Code prohibits a full-time judge from (1) serving as a mediator or arbitrator "apart from the judge's official duties"; and (2) practicing law without the written approval of the Supreme Court. Rule 21-309 NMRA; Rule 21-310 NMRA. The Code, however, expressly exempts from these provisions, "judges serving by contract or appointment on a part-time basis" (judge pro tempore). Rule 21-004 (B)(3) NMRA. Under these exceptions, such judges "are not required to comply at

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any time" with Rules 21-309 and 21-310. While Rule 21-004(B)(3) does not limit a judge pro tempore's ability to act as a mediator or arbitrator, it does restrict a judge pro tempore's ability to practice law. Under Rule 21-004(B)(3)(b), a judge pro tempore may not practice law in the courts on which the judge serves and may not practice in any proceeding in which, or related to which, the judge has served as a judge. Although this is not formally addressed by the Rule, the Committee believes that the same limitation would apply to a judge pro tempore's services as a mediator or arbitrator.

Although the Code does not expressly address whether a judge pro tempore may serve as an administrative hearing officer for a state agency, it does address analogous circumstances. The Code prohibits a full-time judge from accepting an appointment to a governmental position except when required by or concerning the law or the administration of justice. Rule 21-304(A) NMRA. It further prohibits a full-time judge from holding another appointed judicial position. Rule 21-311(D). Rule 21-004(B)(3)(a), however, excepts judges pro tempore from complying at any time with Rule 21-304. A judge pro tempore may, therefore, accept an appointment to a governmental position. The Committee perceives the appointment as a hearing officer for a state agency to be a governmental position within Rule 21-304. Moreover, while Rule 21-311(D) prohibits a full-time judge from holding another appointed judicial position, and even assuming that an administrative hearing officer holds a "judicial position," the prohibition does not apply to a judge pro tempore as defined in Rule 21-004(B)(3).


Thus, the Committee believes that, as a general matter, the Code permits you to act as a hearing officer for a state agency, as a mediator or arbitrator, or as a practicing lawyer, as described above. The Committee cautions that such activities may otherwise be precluded by the Code, depending on the circumstances. In particular, the Committee cautions that, in undertaking any extrajudicial activity that you have described, you must ensure that you do not assume any responsibility or act in a way that (1) "will interfere with the proper performance of" judicial duties; (2) "will lead to frequent disqualification;" (3) "appear to a reasonable person to undermine" your "independence, integrity, or impartiality;" or (4) "appear to a reasonable person to be coercive." See Rule 21-310 NMRA.


In addition, the Committee refers you for compliance to Rule 21-102 NMRA (requiring a judge to "act at all times in a manner that promotes public confidence

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in the independence, integrity, and impartiality of the judiciary” and “avoid impropriety and the appearance of impropriety); Rule 21-103 NMRA (prohibiting a judge from abusing the prestige of office to advance the judge’s personal or economic interests); Rule 21-201 (requiring a judge to give precedence to the judge’s judicial duties); Rule 21-211 NMRA (requiring disqualification “in any proceeding in which the judge’s impartiality might reasonably be questioned”); and Rule 21-310 NMRA (prohibiting a judge from engaging in extrajudicial activities).

Very truly yours,


James J. Wechsler
Co-Chair


Julie J. Vargas
Co-Chair

cc: Hon. Sandra W. Engel
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