

Advisory Committee on the Code of Judicial Conduct

Hon. Frank H. Allen, Jr., Chairman

Hon. Marie A. Baca

Hon. James J. Wechsler

Prof. William MacPherson

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Opinion 01-04

Dear

You have requested that this committee give you an opinion as to whether there is a violation of the Code of Judicial Conduct in a magistrate judge owning buildings which rents office space to an organization which the court refers criminal defendants to for anger management counseling and rents space to an individual, who operates a driving improvement program which also has referrals from the magistrate court.

The Code of Judicial Conduct provides as follows:

Rule 21-200 (B). Impartiality. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interest of the judge or others; nor should a judge convey or permit others subject to the judge's direction and control to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

Rule 21-500 (D):

(1) A judge shall not engage in financial and business dealings that:

...

(b) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

(2) A judge may, subject to the requirements of this Code, hold and manage investments of the judge and members of the judge's family, including real estate, and engage in other remunerative activity.

(4) A judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall divest himself or herself of investments and other financial interests that might require frequent disqualification.

The "Commentary" following D(1) provides, in pertinent part:

A judge must avoid financial and business dealings that involve the judge in frequent transactions or continuing business relationships with persons likely to come either before the judge personally or before other judges on the judge's court. This rule is necessary to avoid creating an appearance or exploitation of office or favoritism and to minimize the potential for disqualification. ...

Rule 21-400. Disqualification.

A. Recusal. A judge is disqualified and shall recuse himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(5) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(c) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding; or...

D. Definitions. As used in this rule:

(1) "de minimis" means an insignificant interest that could not raise reasonable question as to a judge's impartiality;

(2) "economic interest" means ownership of a more than de minimis legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a party, except that:....

For a person to be required to undergo counseling or driver improvement he or she must first be found guilty of a crime or at least a traffic violation. Then a defendant that is referred by the judge to anger management counseling and/or a driver improvement program is required to pay for this counseling or training and devote time and energy to the completion of the programs.

The fact that the judge who has a financial interest with the provider of this services did the sentencing may cast doubt on the judges capacity to act impartially. A judge must avoid investments that result in actual or apparent partiality.

Although the code allows a judge to hold and manage real estate investments the judge must avoid investments that advance the private interests of others by conveying the impression that they are in a position to influence that judge. Did the judge make a judicial determination as to whether to send a defendant to anger management counseling because the defendant needed the services or because the judge's renter has a financial interest that benefits the judge? If others provide the same services as the judges renters, and the judge use only those who rent from him there would be if not actual, apparent partiality. As pointed out in the commentary, "This rule is necessary to avoid creating an appearance or exploitation of office or favoritism and to minimize the potential for disqualification..."

As noted a recusal is not recommended. Rule 21-500 (D) (4) provides that the judge shall manage the judges financial interests to minimize the number of cases which might require frequent disqualification. Although, Rule 21-500 (D) (4) require the judge to divest himself or herself of the financial interest that requires frequent disqualifications the judge is required to divest as soon as the judge can do so without serious financial detriment. Serious financial detriment is not defined in the code and therefore, would depend upon the circumstances of each case. It is our opinion that the judge is required in these situations to investigate the divesture in order to determine how it can be done without serious financial detriment and then to proceed to do so.

Very truly yours,

Frank H. Allen, Jr.
Chairman,
Judicial Advisory Committee

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