

April 22, 2002

Re: Judicial Advisory Committee Opinion No.02-3

Dear:

You have asked this committee for an opinion on two matters: (1) whether you may act as a judge pro tempore after your retirement and also operate a private investigator business; and (2) whether you may write a letter of recommendation on behalf of a convicted felon applying for a pardon.

With regard to your first question, we do not express an opinion as to the applicability of the Code of Judicial Conduct to a retired judge. However, because a judge pro tempore acts as a judge, we believe that a judge pro tempore comes within the applicability of the Code of Judicial Conduct for the purposes of your inquiry. See Rule 21-901(A) NMRA 2002 ("[A] person who serves as a full-time or part-time judge is a 'judge' within the meaning of this Code."). We assume that you would act as a judge pro tempore only on a part-time basis.

A part-time judge may engage in remunerative activity subject to the requirements of the Code of Judicial Conduct. Rule 21-500(D) NMRA 2002. The Code prohibits financial and business dealings of a judge that "may reasonably be perceived to exploit the judge's judicial position" or "involve the judge in frequent transactions or continued business relationships with those lawyers or other persons likely to come before the court on which the judge serves." Rule 21-500(D)(1). It requires recusal if a judge's impartiality might reasonably be questioned, including when a judge has personal knowledge of the facts or an economic interest in the subject matter. Rule 21-400(A) NMRA 2002. It requires a judge to act in such a manner that "promotes public confidence in the integrity and impartiality of the judiciary" and to not use the prestige of the position to advance the private interest of the judge. Rule 21-200(A), (B) NMRA 2002. Therefore, the Code of Judicial Conduct will not permit you to serve as a judge pro tempore if such service provides the appearance that it is used to obtain or assist clients of a private investigation business, if

your partiality might reasonably be questioned, or if there is any conflict, direct or indirect, between the service of clients of the business and service to the court. This prohibition would also embrace circumstances in which there is an appearance that acting as a private investigator and a judge pro tempore could materially influence, directly or indirectly, another judge or court personnel.

Your second question invokes the provision of Rule 21-200(B) that prohibits a judge from lending the prestige of judicial office to advance the private interest of others. Our research indicates that the majority of states which have addressed this question have held that such recommendations should be avoided, even if the judge has a personal basis for the recommendation, unless the recommendation is in connection with a criminal case which the judge handled. See Cynthia Gray, Recommendations by Judges, 11 (American Judicature Society 1996). We do not believe that a judge's recommendation based on personal, rather than professional information, will provide such material information so as to overcome the danger of the appearance of a judge's use of judicial office to sway the decision of the executive branch of government. See id.

Very truly yours,

Frank H. Allen, Jr.  
Chair