

Advisory Committee on the Code of Judicial Conduct

Hon. James J. Wechsler, Chair
Hon. Marie A. Baca
Hon. Kevin L. Fitzwater
Paul L. Biderman, Esq.
Prof. Robert L. Schwartz

August 22, 2006

Re: Judicial Advisory Opinion No. 06-04

Dear

You have asked the Advisory Committee on the Code of Judicial Conduct for an opinion on two issues: (1) the ethical guidelines concerning your accepting a part-time position as executive director of a nonprofit organization; and (2) the propriety of your attending a training class on the defense of DWI cases offered by a noted DWI defense attorney.

With regard to the first question, as a part-time municipal judge, you may engage in another paid position that does not conflict with the hours and duties you are required to perform for your judicial position. Rule 21-500(H) NMRA ("A judge shall not hold any other paid position, judicial or otherwise, that conflicts with the hours and duties the judge is required to perform for every judicial position."). You have informed the Committee that your duties to the organization would not conflict with your judicial duties. Rule 21-500(C)(3) addresses the role of a judge serving as an "officer, director, trustee or non-legal advisor" of a nonprofit organization. It does not directly address your circumstances in that it does not state that a judge may serve as an employee of a nonprofit organization. However, we believe Rule 21-500(C)(3) also sets the guidelines for, and allows, a judge in your position to serve as a part-time executive director of such an organization.

You have advised that the duties of the position with the nonprofit organization would include marketing and fundraising. Rule 21-500(C)(3) is definitive in this regard. Rule 21-500(C)(3)(b) sets forth clear guidelines concerning a judge's role, in any capacity, in the fund-raising activities and membership solicitation of a nonprofit organization. A judge may not use prestige of judicial office for such purposes. Rule 21-500(C)(3)(b)(iv). A judge may assist the organization in planning its fundraising and in the management and investment of the organization's funds, but may not participate in the solicitation of funds or other fund-raising activities, "except that a judge may solicit funds from other judges over whom [a] judge does not exercise supervisory or appellate authority." Rule 21-500(C)(3)(b)(i). A judge may "not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive" or if the solicitation is essentially fundraising. Rule 21-500(C)(3)(b)(iii). You may not work in the position offered to you if you cannot comply with the requirements of Rule 21-500(C)(3).

Your second inquiry is whether a municipal judge may attend a seminar developed and presented by a criminal defense attorney on the defense of DWI cases. As you describe it in your inquiry, the Committee understands the seminar to be designed to advance the skills of defense counsel in a DWI case. Although the Committee does not find a violation of the Code of Judicial Conduct in attending such a seminar, it recognizes that there is a potential appearance of impropriety that may result from attendance.

Indeed, judges are highly encouraged to attend educational programs. Educational programs on complex issues that arise frequently are particularly worthwhile, and presentations by experts in the field with understanding of local issues are very valuable. The Committee's concern arises from the information you have provided about this particular program. DWI cases frequently come before municipal courts, and we understand the seminar to be developed to assist defense counsel to develop strategies for defending their clients in DWI cases. The organizer and presenter is a prominent DWI defense attorney who defends DWI cases in courts around the state. There will be no prosecutorial presenters at the program.

The Code of Judicial Conduct requires judges to maintain strict impartiality in their service on the bench. Rule 21-200(A) & (B) NMRA. "The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and confidence is impaired." Commentary to Rule 21-200(A).

It is reasonable to expect that the defense arguments discussed at the seminar would be raised before you during DWI cases. Because the nature of the seminar is expressly slanted to the defense, attendance at the seminar raises the reasonable risk that participating judges are interested in obtaining, and are better schooled in, the single perspective of defense counsel. We would not have this concern if the prosecutor's perspective were represented at the seminar. Our concern also takes into account the highly sensitive public environment concerning DWI and the critical need that a proper public perception of the courts be preserved. In this environment, it may be reasonable, particularly for someone with an interest in the prosecution of DWI cases, or in a single DWI proceeding, to perceive that a judge who has attended such a one-sided seminar might have a partial view of a particular case or cases. We therefore recommend caution in screening any seminar that you attend, but believe that the one you have described may be undesirable because it is too one-sided.

In connection with this second issue, you also ask if you may attend the seminar given that the attorney presenting the seminar practices in your court. Based on our discussion with respect to the seminar, the Committee does not believe that you may attend the seminar because of the perception of partiality that can reasonably be held if you have recently attended a seminar offered solely by an attorney appearing before you, instructing on the same defenses that may be raised in your court.

Very truly yours,
James J. Wechsler

JJW:ow

cc: Hon. Marie A. Baca
Hon. Kevin Fitzwater
Paul L. Biderman, IPL Director
Professor Robert L. Schwartz