

# 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

January 23, 2007

## Re: Judicial Advisory Opinion No. 07-02

Dear Judge,

You have asked the Advisory Committee on the Code of Judicial Conduct for advice on whether you can accept a position as a municipal chief of police, while simultaneously serving as a part-time probate judge. The Committee believes that, so long as certain conditions are satisfied, your service in both positions will not violate the Code of Judicial Conduct, Rule 21-001 NMRA.

Our opinion relies on the fact that your judicial service is that of a part-time probate judge, with jurisdiction solely over uncontested probate proceedings, and in a county with limited case activity. The Code contemplates that a probate judge may hold other employment. Rule 21-901(C) NMRA. Since your jurisdiction as a probate judge does not encompass criminal cases or civil cases generally involving the city you will serve, there is no inherent conflict with your service in a law enforcement capacity. In this respect, we distinguish your situation from that of a municipal judge having jurisdiction over criminal cases and taking a job in law enforcement, as in Judicial Advisory Opinion No. 95-01. Of course, you must avoid any conflict if particular circumstances give rise to one.

The Code of Judicial Conduct generally limits the ability of judges to accept appointment to other governmental positions in Rule 21-500(C)(2) NMRA, but probate judges are exempted from that limitation by Rule 21-901(C) (1) (b). There are, however, other general provisions that you must consider to ensure that your holding of both positions complies with the ethical requirements of the Code.

First, we call to your attention the requirements of Rule 21-500(H):

**Conflicting compensated activities.** 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. A judge shall devote the number of hours that is required by any judicial position held. In no event shall other paid employment or compensable activity hours be performed simultaneously. (Emphasis added.)

Under this provision, should you accept the position of chief of police, you could only do

so on condition that you set aside sufficient time to maintain the necessary office hours for your service as probate judge. In this regard, the Committee relies on your advice that the probate case activity in your county is minimal, enabling you to arrange your shifts and work as police chief to allow you to perform your duties as probate judge separate from any other responsibilities. Nevertheless, the Committee strongly suggests that a judge needs to maintain regular and predictable hours to ensure that the public is aware of the judge's availability. Additionally, as stated in Rule 21-500(H), your services as probate judge cannot be performed simultaneously with your work as chief of police. You would have to assess whether this requirement might interfere with your ability to perform your responsibilities as chief of police, including your ability to respond to emergency situations.

Another general provision of the Code that you should consider would determine whether your interest as head of the city police force might put you in conflict with your adjudication of debts owed by an estate. You might find that the city that you work for has claims against some of the estates that you are called upon to adjudicate. If the financial viability of your department would be materially affected by such claims, you would be placed in a conflict situation requiring you to recuse from the case under Rule 21-400(A)(3), (5) NMRA. Were such claims rare or uncontested, or their impact on your administrative role as police chief *de minimis*, you would not be required to recuse yourself. But if such claims were to arise with sufficient frequency in your court to require repeated recusal, that circumstance would indicate that you should choose between your judicial and law enforcement duties.

We note in this regard the constraint of 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.

While this provision does not strictly contemplate public service, we believe that the message is clear: a judge may not put himself or herself in a situation in which the judge's financial interest so frequently comes into conflict with judicial duties that the judge cannot fulfill the obligations of the judicial position.

Apart from these general constraints and subject to your assessment as to your ability to perform your responsibilities as chief of police without interference due to your probate judge responsibilities, we do not see that your acceptance of the position of chief of police for your city while serving as part-time probate judge for your county would violate the Code of Judicial Conduct.

Very truly yours,

James J. Wechsler  
Chair

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