

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

April 19, 2007

Re: Judicial Advisory Opinion No. 07-05

Dear Judge,

You have asked the Advisory Committee on the Code of Judicial Conduct for an opinion as to whether you must recuse on a case.

You report the following facts. You have been on the bench for slightly more than four years. Prior to that time, you were in a small private practice. There are not many practitioners in your county, as a result of which your former law partner is involved in representing clients in most of the criminal cases on the county docket. In order to clarify your participation in cases involving your former partner, you notified the district attorney and your former partner that if requested you would recuse in all cases, civil or criminal, involving your former partner for a period of five years from the time you became a judge. Your former partner has now requested by letter that you recuse from the domestic relations case that is the subject of your inquiry.

The case was filed on August 12, 2004. Your former partner's law firm currently represents the respondent. Prior to his involvement, the respondent had two other attorneys and also acted pro se. You were assigned the case on September 27, 2004 after the respondent's first attorney filed a peremptory election to excuse the original judge in the case. Since March 3, 2005, when you approved the withdrawal of the petitioner's attorney, the petitioner has acted pro se. You and the domestic relations hearing officer have made multiple decisions regarding child custody and child support issues in the case, and the other judge in your county has mediated a visitation dispute. On February 24, 2006, an associate of your former partner filed objections to a special master's report and order as well as a motion requesting reconsideration of special master's order. The associate knew of your prior relationship with his law firm, but did not raise any issue of a conflict. Although the law firm has not filed an entry of appearance, it has appeared as the respondent's attorney of record since February 24, 2006. In his letter to you, your former partner states that his client would like you to recuse.

The rules concerning a judge's disqualification and recusal are contained in Rules 21-400 NMRA of the Code of Judicial Conduct. Under Rule 21-400(A), a "judge is disqualified and shall recuse . . . in a proceeding in which the judge's impartiality might reasonably be questioned." The rule specifically requires a judge to recuse if "the judge has a personal bias or prejudice concerning ... a party's lawyer." Rule 21-400(A)(1).

This Committee has also observed the relevancy of Rule 21-200 NMRA to the issue of disqualification and recusal, in particular with respect to a judge's presiding in a case in which the judge's former law partner or associate appears. *See* Advisory Opinion No. 89-6 (attached). Rule 21-200(A) requires a judge to act "in a manner that promotes public confidence in the integrity and impartiality of the judiciary." It requires a judge to avoid the appearance of impropriety in order to maintain public confidence in the judiciary. *See* Commentary to Rule 21-200(A).

In Advisory Opinion No. 89-6, this Committee noted that a judge's handling of a case involving a former law partner or associate within a short time after the judge has assumed the bench may provide an appearance of impropriety. We therefore advised that a judge let a reasonable period of time pass before working on such cases. We recognized that a variety of factors must be considered in determining the appropriate period of time, including such considerations as the length of time of the association, the size of the firm, and any financial arrangement that the judge may have with the firm. Indeed, we clearly stated that a judge should not participate in a case if the judge continues to have any financial relationship to the firm. Without any financial relationship, we recommended that, although it was difficult to state the length of a reasonable period of time that must pass, a five-year period should pass before the judge hears cases in which a party is represented by the judge's former partners and associates.

Although we understand that you are attempting to satisfy this five-year period, it is not an absolute standard. The Committee recommended that length of time as a maximum period-to avoid appearances of impropriety in cases at high risk of creating such appearances. The purpose of the time period is to protect the public's confidence in the impartiality of the judiciary by avoiding the appearance that a judge would not be impartial in a case with an attorney or attorneys with whom the judge used to practice. Of course, the likelihood of creating such an appearance diminishes over time. Many factors bear on this issue in addition to those mentioned in Advisory Opinion 89-6, and a period of fewer than five years may satisfy the concerns of the rule. For example, you have informed us that in your district's criminal docket, despite your notice to the district attorney and your former partner that you would recuse in any of your former partner's cases upon request, no one has made such a request, and you have presided over numerous criminal cases in which your former partner was the attorney. This history indicates that your prior relationship with your former partner has not had a significant effect on the public confidence. This result is not surprising because in a district such as yours without a large number of judges and attorneys, it is easier for the public to obtain information about each individual judge. The Committee considers the size of the district to be another factor that affects the length of time that is appropriate in each circumstances.

In addition, you have indicated that, in this case, you have already issued rulings on a number of issues, and it is only after reviewing those rulings that the request for your recusal has been made. Although we do not express an opinion about its merits, this timing of the request gives reason to question its purpose. We do not believe that the rule should be technically applied to require recusal if the public confidence purposes of the rule do not indicate a reason for recusal. We note that a judge has a responsibility to sit on a case

unless . the judge has a "compelling constitutional, statutory or ethical cause" for recusal. *Gerety v. Demers*, 92 N.M. 396, 400, 589 P.2d 180, 184 (1978).

In summary, the Committee believes that there is no absolute rule as to the length of time a judge must recuse from cases in which the judge's former law partner or associate appears for either party. Instead, the period of time depends on the circumstances. In the circumstances you present, the Committee does not believe that it is necessary for you to automatically recuse based on your former partner's letter. We believe that it would be sufficient for you to invite a motion concerning the issue and for you to address the merits of the request through the motion.

Very truly yours,

James J. Wechsler
Chair

JJW:ow
Attachment

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

August 29, 1989

The Honorable Frank H. Allen, Jr.
District Judge; Div. IV
Judicial Advisory Committee
Chairman
P.O. Box 488
Albuquerque, AIM 87103

Re: Judicial Advisory Committee Opinion

You have asked the Judicial Advisory Committee to advise you concerning whether a Judge should recuse when a former partner or associate is an attorney of record in a matter before that Judge.

That portion of SCR 21-400 Disqualification, which applies to your question, is as follows:

A judge is disqualified and shall recuse himself in any proceeding in which:

- a) he has ... personal knowledge of disputed evidentiary facts concerning the proceeding;
- b) he served as a lawyer in the matter or controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter,.... (Emphasis added.)

Therefore the Judge must recuse if he has prior knowledge of a matter before him through his association or if the matter before him was in the law office which he was associated with prior to the Judge going on the Bench.

SRC 21-200, which requires the Judge to avoid impropriety and the appearance of impropriety, is also relevant to this question. The appearance of a former law partner or associate before a Judge within a short period of time after the Judge has left the partnership, may give the appearance of impropriety especially to the Public. It is therefore advised that some reasonable period of time pass before a case involving former partners or associates be heard by the Judge. This period of time may vary depending upon the length of the association, the size of the firm the Judge was a member of, and any financial arrangement which is made with the Judge when he leaves the firm.

Clearly the Judge should not hear cases where members of his former firm are representing parties if he still has some financial dealings with the firm such as, but not limited to, deferred compensation or a payout for the value of his corporate or partnership interest.

As to how long any financial dealing between the Judge and his partners should last, SRC 21-

500 D.(2) provides, “A Judge shall manage his investments and other financial interests to minimize the number of cases in which he is disqualified. As soon as he can do so without serious financial detriment, he should divest himself of investments and other financial interests that might require frequent disqualification.”

As to what is a reasonable period for the Judge to recuse when a former partner or associate represents a party in a case before the Judge is difficult to say. But this Committee would recommend that, assuming that any financial interest between the firm and the Judge has been resolved, a period of five years should pass before the Judge hears the cases of his former partner or associate.

Very truly yours,

Frank H. Allen, Jr.
Judicial Advisory Committee
Chairman

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