

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

June 4, 2007

Re: Judicial Advisory Opinion No. 07-07

Dear Judge,

You have advised the Advisory Committee on the Code of Judicial Conduct that after a member of your court retired from his position as judge, he resumed the active practice of law and represents parties in cases before your court. You served with this former judge on the court, and your current colleague assumed his position after the former judge's retirement. You have inquired whether the Code of Judicial Conduct requires either you or your colleague to recuse on cases involving the former judge.

Rule 21-400 NMRA of the Code of Judicial Conduct states the requirements concerning disqualification and recusal of a judge. As pertinent to your inquiry, it states that a "judge is disqualified and shall recuse himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned," including in circumstances in which "the judge has a personal bias or prejudice concerning ... a party's lawyer." Rule 21400(A)(1). You have informed the Committee that you do not have any personal bias or prejudice with respect to the former judge and would treat a case in which he is an attorney the same as any other case before you. The issue, therefore, is whether your impartiality, or that of your current colleague, might reasonably be questioned because the former judge acts as an attorney in a case in your court.

When you and the former judge served as colleagues in your court, you both did so as elected judges with a constitutional, statutory, and ethical obligation to serve the public. N.M. Const. art. VI, § 26 (authorizing establishment of magistrate courts); NMSA 1978, §35-1-3 (1968) (stating nomination and election procedure for magistrate judges); Rule 21300 NMRA (stating a judge's obligations to perform the duties of judicial office). Each of you had an independent docket. As public officials, you did not have the linkage of that of law partners, or even law associates, whose financial success depends on the work of the other. Different rules apply in such circumstances. *See* Rule 21-400(A)(2) (requiring disqualification and recusal when "a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter"). Because you served with the former judge only in an official capacity, the Committee

does not believe that such service objectively affects your impartiality in cases in which the former judge acts as an attorney.

Moreover, a judge has a responsibility to perform the judge's duties except under compelling circumstances requiring the judge's disqualification. *See Gerety v. Demers*, 92 N.M. 396,400,589 P.2d 180, 184 (1978) ("[A] judge has a duty to perform the judicial role mandated by the statutes, and he has no right to disqualify himself unless there is a compelling constitutional, statutory or ethical cause for so doing."). The Committee does not believe that your performance of your official responsibilities in the same court as your former colleague gives rise to compelling circumstances under which your impartiality might reasonably be questioned. Because your current colleague did not even serve with the former judge, there is even less basis to question his impartiality, and the Committee does not see any basis for his disqualification, absent individual circumstances that may exist that you have not brought to our attention.

Our opinion is not altered by the fact that the former judge occasionally serves as a judge pro tempore outside of the jurisdiction of your court. His performance of that service does not carry over to your court, and he no longer serves as a judge in your jurisdiction.

Very Truly Yours,

James J. Wechsler

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Cc: Hon. Marie Baca
Hon. Kevin Fitzwater
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