

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 16, 2007

Re: Judicial Advisory Opinion No. 07-09

Dear Judge,

You have asked the Advisory Committee on the Code of Judicial Conduct whether you can serve as President or a member of the Board of a non-profit organization that has contracts with the County to select and hire a private company to provide many operational services for a county-owned general hospital. There is now in place a long term contract between the non-profit organization and the private company, which currently provides the hospital its CEO, other personnel and financial oversight. The non-profit organization of which you are President is, in effect, an intermediary that serves much of the role that otherwise would be served by the County Commission in operation of this government-owned hospital. You have reported that the hospital sometimes appears before the court in garnishment proceedings, and, of course, the hospital may otherwise appear before the court to collect hospital bills in other ways, and for other reasons.

The Code of Judicial Conduct addresses a judge's extra-judicial activities in Rule 21500, which provides:

A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.

A. Extra-judicial activities in general. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

(1) cast doubt on the judge's capacity to act impartially as a judge;

....

C. Governmental, civic or charitable activities.

....

(2) A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of factor policy on matters other than the improvement of the law, the legal system or the administration of justice....;

(3) A judge may serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice or of an educational, religious, charitable, fraternal, or civic organization not conducted for profit, subject to the following limitations and other requirements of this Code:

(a) A judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely that the organization:

(i) will be engaged in proceedings that would ordinarily come before the judge; or

(ii) will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

There is some doubt about whether this inquiry should be evaluated under Rule 21500(C)(2) or (3), because it is not clear whether the Board is best characterized as a governmental agency, given its function, or a private non-profit organization, given its formal organization. In any case, the Board established to operate the hospital is so intertwined with the County and the private firm operating the hospital that litigants may not be able to distinguish their formal roles, and a legal action by the hospital reasonably may be perceived to be an action of the County, the non-profit organization, or the private firm.

If the Board is treated as a non-profit organization, it is governed by Rule 21-500(C)(3), which would permit your service unless the organization will be engaged in proceedings that would ordinarily come before you, or the organization will be frequently involved in adversary proceedings in your court. As you point out, there are regular attempts to garnish wages for the benefit of the hospital that do come through your court. Thus, your continued service on the Board of the non-profit organization would be prohibited by Rule 21-500(C)(3)(a)(i) because actions affecting the hospital would ordinarily come before the court.

If the non-profit organization really serves the role of the County Commission, your service on the Board would be governed by Rule 21-500(C)(2), which prohibits your service in a government position "on matters other than the improvement of the law, the legal system or the administration of justice." Because your service on the Board would entail addressing issues of policy that are unrelated to the legal system, such service would be inconsistent with this part of the Rule, too.

Finally, whether this inquiry should be governed by Rule 21-500(C)(2) or (3), it is also governed by Rule 21-500(A)(1), which prohibits conduct which casts doubt on the judge's capacity to act impartially as a judge. Although there is no evidence whatsoever that any decision you have made has been affected by your strong commitment to the hospital, a respondent who is the subject of a garnishment proceeding, for example, might be concerned about your ability to act impartially in a case in which hospital revenues might be affected. As Rule 21-200 points out, "A judge shall avoid ... the appearance of impropriety" as well as impropriety "in all the judge's activities."

We note that the Commentary to Rule 21-500 itself points out that, "Complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives," and that other state judiciaries have been ambivalent when confronting this issue. The Florida Supreme Court Judicial Ethics Advisory Committee, for example, addressed the issue in 1983 and revisited the issue in 1991, 1994 and 2006. It determined that judicial service on a hospital board was "either prohibited ... or ... strongly discouraged" by the relevant rule, although most recently the Committee appeared to loosen its restriction to permit the service unless "frequent disqualification would be necessary." See Fl. Op. 2006-28. The Massachusetts Supreme Judicial Court has reached a similar result, permitting such service only if the hospital's appearance in court would be "very infrequent." See Mass. CJE Op. 2001-5.

Recusal would be sufficient if the hospital's presence as a party in court were very rare. See Rule 21-400(5)(a). In this case, where the hospital is likely to be involved in regular litigation in your court, the Committee believes that it would be inappropriate for you to remain President, or a member of the Board, of the Board during your tenure as a judge.

Very truly yours,

James J. Wechsler
Chair

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