

Advisory Committee on the Code of Judicial Conduct

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

February 18, 2008

Re: Judicial Advisory Opinion No. 08-01

You have written to the Advisory Committee on the Code of Judicial Conduct to inquire about whether it is consistent with your judicial obligations to publicly campaign against proposed Amendment 7, which would require that all candidates who seek the position of Municipal Judge be licensed to practice law in New Mexico. In opposing this ballot measure, you would like to write commentary for the press, discuss the matter at debates (and, presumably, elsewhere), appear where you believe it would be helpful to oppose the Amendment, and speak against the proposed amendment on radio. You also intend to rejoin the National Judges Association and become active in that organization, which gives a unified voice to non-attorney judges. Your request requires a review of several provisions of the Code of Judicial Conduct and recent judicial decisions that have considered the First Amendment speech rights of judges.

First, the Code itself explicitly permits the kind of conduct you propose. Rule 21-700(a)(I) NMRA, which governs political activity, provides that, "A judge may engage in political activity on behalf of the legal system, the administration of justice, measures to improve the law and as expressly authorized by ... this Code." It is clear that you will be speaking consistently with this provision and that your proposed conduct thus falls within this section of the Code.

Arguably, your conduct also falls under Rule 21-500 NMRA, which governs extra-judicial activity. That provision says that, "A judge may speak, write, lecture, teach and participate in other extra judicial activities concerning the law, the legal system, the administration of justice" Rule 21-500(B). In addition, Rule 21-500 (C)(3) makes it clear that you may be an active member of an organization that seeks to improve the law, such as the National Judges Association.

Indeed, in Rule 21-500(B), New Mexico goes beyond the 1990 model code on which it was based, in specifically enabling judges to speak publicly even on "non-legal subjects." New Mexico has thus demonstrated its commitment to the First Amendment rights of judges to speak

out on public issues. In doing so, our state anticipated the First Amendment speech rights guaranteed by the United States Supreme Court in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). The Committee finds no restriction in New Mexico's Code of Judicial Conduct against speaking out against this proposal. Moreover, in view of the Code's recognition in Rules 21-700(A(1)) and 21-500(B) of a judge's right to engage in speech concerning the legal system and the improvement of the law, the Committee does not see any limitation in the Code of your proposed actions that would satisfy the strict scrutiny standard for such limitations imposed in *White*.

Of course, there are standards that apply to your participation in this public debate over Amendment 7. Rule 21-100 requires that "A judge shall uphold the integrity and independence of the judiciary." Similarly, Rule 21-200 states, "A judge shall avoid impropriety and the appearance of impropriety in all the judge's activities." Subsection (A) of that Rule goes on, "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." In addition, Rule 21-300(B)(11), provides, "A judge shall not, with respect to cases, controversies or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office." As long as you act in a way that protects the integrity, independence and impartiality of the judiciary, that *does* not take an amount of time that is inconsistent with your judicial functions, and that avoids impropriety and the appearance of impropriety, the Committee believes *your proposed* conduct in opposition to Amendment 7 and your efforts on behalf of the National Judges Association are peg Knitted by the Code of Judicial Conduct as adopted in New Mexico and protected by the First Amendment.

Very truly yours,

James J. Wechsler Chair

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cc: Hon. Kevin Fitzwater
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Robert L. Schwartz