

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 25, 2008

Re: Advisory Opinion No. 08-02

You have asked the Advisory Committee on the Code of Judicial Conduct for an opinion as to whether the Code of Judicial Conduct requires you to recuse in cases before your court in which a criminal defense attorney appears on behalf of clients. The attorney regularly appears in your court as a court appointed attorney and has requested your recusal.

Recently, Judge A charged the attorney with contempt of court for failing to appear and for appearing late without notice. In the contempt case, the attorney filed a peremptory challenge of Judge A, and the case was assigned to Judge B. The attorney entered a not guilty plea. After Judge B granted continuances of the trial and denied a motion to dismiss, the district court issued an alternative writ of prohibition and superintending control and stay. The case is now pending in the district court.

The Code of Judicial Conduct addresses the disqualification and recusal of a judge in Rule 21-400 NMRA. It provides, in pertinent part, that a "judge is disqualified and shall recuse himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Rule 21-400(A). In particular, a judge is disqualified and must recuse when "the judge has a personal bias or prejudice concerning a party or a party's lawyer." Rule 21-400(A)(1). As a general rule, the individual judge makes the determination as to whether the judge's impartiality might reasonably be questioned as a matter for the judge's "conscience" and discretion. *Purpura v. Purpura*, 115 N.M. 80, 84, 847 P.2d 314, 318 (Ct. App 1993). Your inquiry concerns whether either of you must recuse because of personal prejudice that the attorney believes exists as a result of the attorney's involvement in the contempt case in your court, The Committee does not believe that either of you must recuse under the Code.

As to Judge A, the judge who held the attorney in contempt, we find guidance in the discussion in *In re Avallone*, 91 N.M. 777, 581 P.2d 870 (1978). The Supreme Court stated in that case that the "proper test for determining whether the impartiality of a judge has been affected by the acts of a contemnor is whether the act involves the personal feelings of the judge. *Id.* at 778, 581 P.2d at 871. Indeed, if a judge becomes "personally embroiled" in the matter, due process would require the judge to recuse. *Id.*

At issue in your inquiry is not the recusal of Judge A in the contempt proceeding, but

in other cases in which the attorney is involved. Unless Judge A harbors some personal feelings against the attorney such that he does not believe that he can act impartially in a case involving the attorney, the Committee does not believe that he must recuse. Generally, such animosity "must stem from an extrajudicial source" rather than from opinions Judge A formed while presiding over cases in his court in order for recusal to be required. *United Nuclear Corp. v. General Atomic Co.*, 96 N.M. 155, 247, 629 P.2d 231, 323 (1980) (internal quotation marks and citation omitted); *Dawley v. La Puerta Architectural Antiques, Inc.*, 2003-NMCA-029, ¶ 39, 133 N.M. 389, 62 P.3d 1271. In addition, the contempt proceedings in the district court would not require Judge A to recuse in other cases in the absence of Judge A feeling a personal animosity toward the attorney that would necessitate recusal. See Rule 21-400(A)(1). The proceeding will not require Judge A to be a witness in a case pending before him. See Rule 21-400(A)(5)(d) (requiring recusal if the judge is likely to be a material witness in the proceeding). Judge A will be expected to testify about his court proceeding, not extrajudicial information. See *United Nuclear Corp.*, 96 N.M. at 247, 629 P.2d at 323; *Dawley*, 2003-NMCA-029, ¶ 39.

For similar reasons, the Committee does not believe that the involvement of Judge B in the contempt proceeding requires her recusal. Judge B acted only as the presiding judge in the proceeding. Unless she harbors some extrajudicial personal feeling of prejudice toward the attorney, such involvement does not require recusal under Rule 21-400(A)(1). *United Nuclear Corp.*, 96 N.M. at 247, 629 P.2d at 323; *Dawley*, 2003-NMCA-029, ¶ 39.

Very truly yours,

James J. Wechsler, Chair

JJW:ow

cc: Hon. Kevin Fitzwater
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Professor Robert L. Schwartz