

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: **Judicial Advisory Opinion No. 08-03**

You have inquired of the Advisory Committee on the Code of Judicial Conduct whether you must recuse in two related cases from an adjoining judicial district on which you preside as the designated district judge by order of the New Mexico Supreme Court. The judges in the judicial district in which the cases were filed were either disqualified or recused.

You describe the circumstances as follows. The cases concern a real estate foreclosure and other issues, involving a mortgage company and property owner, as well as other parties. In the case in which the property owner is the plaintiff, he has named as defendants, in addition to the mortgage company, its attorneys and the chief judge and court clerk of the judicial district in which the cases were filed. At this time, you have been presiding in both cases for a few months and have resolved a motion to vacate a motions hearing on various dispositive motions. You informed the parties that, because of your busy docket, you would require the parties to come to your court for the hearing on the motions. Less than two weeks before the scheduled date for the hearing, the property owner, acting pro se, filed an amended complaint, without leave of court, adding a claim against you. It alleges that you do not have the authority to require the parties to present their motions to you in your court and claims that you are essentially conspiring and violating his civil rights. He has provided you with a summons to accept service and answer. You have vacated the hearing.

Rule 21-400(A) NMSA reads: "A judge is disqualified and shall recuse himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned " In its subsections, Rule 21-400(A) states examples of circumstances in which a judge's impartiality would reasonably be questioned. Subsection (5) includes the circumstance of when the judge "is a party to the proceeding." As you point out in your inquiry, this rule appears to be mandatory in its language.

However, the Committee does not read the rule to be without exception. Under Rule 21-400(A), the obligation to recuse arises from the objective standard of whether the "judge's impartiality might reasonably be questioned." If the judge's impartiality is questioned based on a claim against the judge that is a sham or frivolous or designed to impede the judge from

performing the judge's responsibilities in the case, the Committee does not believe that the objective standard of Rule 21-400(A) is met requiring the judge's recusal.

We are instructed in our analysis by cases that state that the use of a lawsuit to disqualify a judge is not an acceptable procedure. *See In re Ronwin*, 680 P.2d 107, 117 (Ariz. 1983) (en banc) ("A judge is not disqualified merely because a litigant sues or threatens to sue him. Such an easy method for obtaining disqualification should not be encouraged or allowed.") (internal quotation marks and citation omitted); *Commonwealth ex rel. Meredith v. Murphy*, 174 S.W. 2d 681, 683 (Ky: Ct. App. 1943) ("And it may be readily agreed that the filing of a sham or frivolous pleading in which the presiding judge of the court where the case is to be tried is made a party for the sole purpose of disqualifying him is reprehensible and should not be countenanced or the purpose allowed to be accomplished."). Although these cases do not involve a claim filed in the same case as that in which the judge is currently presiding, the underlying principle is the same. It is inappropriate to permit a party to obviate the rules to obtain a new judge by suing the presiding judge.

By this discussion, we do not state that the property owner filed the amended complaint for the purpose of disqualifying you. That determination is a factual one, and we are not in the position to address the facts. However, from the facts you have presented, the amended complaint appears to be a sham or frivolous. You have advised that the amended complaint alleges conspiracy and civil rights violations because you required the motions hearing to be held in your courtroom. In making that order, you were acting in *your* capacity as presiding judge. In that capacity, you are immune *from lawsuit*. *See Pierson v. Ray*, 386 U.S. 547, 553-54 (1967) ("Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction."). Although the property owner may not have filed the amended complaint to disqualify you, from the nature of its allegations, it can be reasonably inferred that the filing was designed to impede you in your performance of *your* judicial responsibilities in these cases. We consider this intent to be akin to that of forcing recusal and governed by the same discouraging review from the courts.

We thus do not believe, for policy reasons, that the mere filing of the amended complaint mandates your disqualification without consideration of the circumstances. We also do not believe that you are precluded from conducting a hearing to consider the circumstances because of the facial nature of the amended complaint as a sham or frivolous pleading. Of course, if after a hearing you find otherwise, you must recuse from the cases by virtue of Rule 21-400(A)(5)(a). In addition, if you believe that you do harbor a personal prejudice against the property owner, such that your impartiality might reasonably be questioned, you would, of course, need to recuse. Rule 21 -400(A)(1). As a general rule, to be disqualifying, such prejudice "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what [you] learned from [your] participation" in the cases. *United Nuclear Corp. v. Gen. Atomic Co.*, 96 N.M., 155, 247, 629 P.2d 213, 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.

Very truly yours,

James J. Wechsler, Chair

cc: Hon. Kevin Fitzwater
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