

# 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

July 1, 2008

## **Re: Advisory Opinion No. 08-05**

You have inquired of the Advisory Committee on the Code of Judicial Conduct as to whether your incoming law clerk may serve an appointment to the County Planning Commission. He would do so, as a non-paid, public volunteer.

You have informed the Committee that the Planning Commission is an independent body that considers land use proposals in the unincorporated portions of the County. It then makes findings and recommendations, which it sends to the County Commission. The County Commission acts independently upon the Planning Commission's recommendations. You have further informed the Committee that your court has a relatively low and variable volume of cases actually involving the County or any of its subordinate bodies. With that predicate, you note that although your incoming law clerk would not be able to work on any matters involving County, that inability would not pose any great difficulty for your court or your chambers with such a low volume of cases. To you, the more difficult question is the potential conflict proposed by persons appearing in front of the Planning Commission. In this regard, you propose that your incoming law clerk also not work on any cases involving persons or entities seeking approval from the Planning Commission, and you further propose to insulate your incoming law clerk from any such cases in such a manner that he would be prevented from working, having knowledge of, and providing any input to any of those cases.

The Committee believes that your inquiry involves three types of potential conflicts of interest. We address them in the reverse order of their concern.

The first is your concern that a potential conflict exists with regard to persons or entities appearing before the Planning Commission who may have another case before your court. The Committee does not share this concern. There is no need for

judges to recuse from cases involving parties who have previously or are currently appearing before them in other cases, and judges regularly hear such cases. Your law clerk need not meet stricter requirements. Of course, if there are particular reasons why he does not believe that he can participate in a case involving any such party, you can relieve him from such responsibility.

The second possible area of conflict concerns all cases in which the County is a party. The Committee agrees with you that it would be a conflict of interest for your law clerk to work on such cases. The Committee also agrees that, as to such cases, his conflict of interest does not present any conflict to you as the judge, as long as you prevent him from working on having knowledge of, or providing any input. See Rule 21-400(A) NI 1RA ("A judge is disqualified and shall recuse . . . in a proceeding in which the judge's impartiality might reasonably be questioned."). We suggest that you discuss with your chief judge the specific ways to insulate your law clerk in this manner. We expect that they will include a prohibition on your assigning any tasks pertaining to the case to your law clerk, as well as notice to others working on it not to discuss it in any manner with him.

The third possible conflict presents greater difficulty. It pertains to cases in which the County is a party and which concern matters in which the Planning Commission, including your law clerk, has taken action. In these cases, although you can internally insulate your law clerk from any involvement, his relationship to you as your only in-chambers clerk may reasonably give an outsider the perception that he could influence your decision in the case. As a result, for such cases, the Committee believes that Rule 21-400(A) would require your recusal.

The Committee does not believe, however, that, even with this conclusion; the Code of Judicial Conduct prohibits you from hiring your incoming law clerk. As a general matter, a judge should *try* to avoid taking actions that put the judge in a position that will disqualify the judge from hearing and deciding cases that regularly come before the judge. Cf. Rule 21-200(A) NMRA ("A judge . . . , shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."). But, based on the facts you have presented in your request, the Committee understands that the circumstances that would require your recusal are remote. You have stated that your court, of which you are one of ten judges, handles a relatively low volume of cases involving the County. You have also advised that your incoming law clerk will work with you for a period of two years. With these suppositions, it is unlikely that you will be called upon to address any

case in which your law clerk will be acting both in that capacity and as Planning Commissioner.

We note that this opinion relates only to the applicability of the Code of Judicial Conduct to your inquiry. We call your attention to Section 11.02 of the New Mexico Branch Personnel Rules (adopted February 1, 2005), which also may have applicability.

Very truly yours,

James J. Wechsler  
Chair

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cc: Hon. Kevin Fitzwater  
Paul Biderman, IPL Director  
Professor Robert L. Schwartz

# NEW MEXICO JUDICIAL BRANCH PERSONNEL RULES

## SECTION 11. OUTSIDE EMPLOYMENT

### 11.01 PURPOSE

To allow outside employment under certain circumstances.

### 11.02 ENGAGING IN OUTSIDE EMPLOYMENT

An *employee* may engage in outside employment, compensated or uncompensated, if:

- A. no conflicts of interest result;
- B. the outside employment is not detrimental to the interests of the *Judicial Branch*;
- C. the outside employment is not directly related to the practice of law unless it is pro bono work approved by the *Administrative Authority*; and
- D. *the employee* gives written notice to the *Administrative Authority* before the work is commenced. The notice shall include the name of the employer and the type of work to be performed.