



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

November 4, 2009

Re: Judicial Advisory Opinion No. 09-04

You have asked the Advisory Committee on the Code of Judicial Conduct for advice concerning your handling of cases involving the New Mexico State Police. You currently recuse on such cases because your husband is the captain for the three-county state police district in which your court is located. You are interested in whether you are disqualified from cases involving the New Mexico State Police, and, if so, whether such cases can nevertheless be assigned to you for you to determine if the parties will waive your disqualification.

You have provided the Committee with the official description of your husband's responsibilities as the only captain in the district. He is responsible for the supervision and management of the district, including its legal obligations. He is responsible for all of the district's operational and administrative functions. He is specifically responsible for establishing "liaison with the courts and prosecutors to develop [a] good working relationship with all personnel" in the district.

Under Rule 21-400(A) NMRA, "[a] judge is disqualified and shall recuse himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Because of your husband's overall responsibility for the district's operational and administrative functions, the Committee believes that your impartiality might reasonably be questioned in cases involving state police officers working in the district. Indeed, not only is your husband at least indirectly responsible for their work on their cases, he is also directly responsible to provide liaison with the courts and prosecutors for the work of the officers within the district.



Rule 21-400(A) also specifically lists instances in which a judge must recuse, including when the judge knows that the judge's spouse has "more than *de minimis* interest that could be substantially affected by the proceeding." Rule 21-400(A)(5)(c). Because of your husband's supervisory and administrative oversight of the district, it would also be reasonable to believe that the success of the officers in the district in prosecuting their court cases may have bearing on his continued employment in his position. Rule 21-400(A) disqualifies you from participating in cases involving officers within your husband's supervision.

In cases of a judge's disqualification, Rule 21-400(C) nonetheless permits a judge to participate in a case if the judge discloses on the record the basis for disqualification and allows the parties and their lawyers to consider, outside of the judge's presence, whether they all agree to waive disqualification and proceed with the case before the judge. This agreement must be made part of the record in the case. Rule 21-400(C). Thus, as a general rule, in cases in *which* there is a Rule 21-400(C) remittal, a disqualified judge may proceed as the judge in the case.

You have suggested that, even though you are disqualified, the clerk of your court can nevertheless assign the cases to you, the parties can then appear before you, and you could then advise them of your disqualification and their right to waive it. As the Committee understands your docket, in many cases the defendants appear pro se and the State is represented by a state police officer. Rule 21-400(C) does not apply to such circumstances. In order to ensure that "the question of remittal is made independently of the judge," it contemplates that a judge "not solicit, seek or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation." Commentary to Rule 21-400(C). Without attorneys, even if the court, independent of your involvement, were to inform the parties of their waiver right, there would be no firm basis to conclude that the parties made a knowing and voluntary waiver. In addition, because state police officers and prosecutors would need to agree to a waiver, and your husband either supervises or acts as liaison with them, there could be a reasonable appearance of impropriety that could affect the public's perception of the integrity of the judicial process. *See* Rule 21-100(A) (noting the need for a judge to preserve the integrity of the judiciary).

As a result, the Committee believes that you are disqualified from hearing New Mexico State Police cases involving officers within your husband's supervision and that you may not accept such cases subject to possible waiver of your disqualification by the parties.

Very truly yours,

James J. Wechsler Chair

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