



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 3, 2009

Re: Judicial Advisory Opinion No. 09-05

You have asked for guidance from the Advisory Committee on the Code of Judicial Conduct concerning your publication, marketing, and sale of a book of your poetry. You have inquired about both the publication itself and the manner in which your name and position will be used in connection with the promotion of the book.

You have provided the Committee the following facts. The book contains poems that are not legal in nature. The publisher markets primarily in the southwest, and the book will be available in bookstores and on the internet. It will be promoted on the internet and in various other ways such as in literary publications, fliers, and mailings. Because the method of promotion cannot be selective when addressing the community at large, you would expect that individuals within the legal community will be included in the promotional efforts. You will be listed as the author without title. However, in a brief biographical note, there will be a photograph and a description of your personal background, including your being a former attorney in private practice and your current position as a XXXXX judge. You would not be wearing a robe in the photograph.

Under Rule 21-500(B) NMRA, a judge may "speak, write, lecture, teach and participate" in extra judicial activities concerning non-legal subjects, "subject to the requirements" of the Code of Judicial Conduct. Rule 21-500(A) specifically sets forth limitations on such extra judicial activities. They must not: "(1) cast doubt on the judge's capacity to act impartially as a judge; (2) demean the judicial office; (3)

interfere with the proper performance of judicial duties; or (4) violate the judge's oath and obligation to uphold the laws and constitutions of the United States and the State of New Mexico."

From the facts you have provided, it appears that the publication of your book does not conflict with these limitations, subject to our cautionary notes that follow. As to the first limitation, you state that the poems are not legal in nature. Even so, if any poem was to make a statement as to commit, or appear to commit, you as to an issue or controversy in a proceeding, you would be required to recuse yourself from such proceeding. Rule 21-400(A)(6) NMRA. As a result, we advise that you scrutinize each of the poems to be published to ensure that there is no such content. As to the second limitation of Rule 21-500(A), we would caution you to review each poem to ensure that it does not, in any way, infringe upon your obligation to establish, maintain, and enforce high standards of conduct as required by the Code of Judicial Conduct, Rule 21-100 NMRA, and otherwise does not demean your judicial office. You have provided the Committee samples of the poems to be published. If these samples are representative of all the poems in the book, we do not perceive a problem in this regard. As to the third limitation, there is not a problem so long as you do not work on the publication and promotion of the book during work hours and your work does not interfere with your ability to perform your judicial duties. As to the fourth, we again suggest that you review the content of each of the poems.

With regard to promoting the book, we refer you to Rule 21-200(B) NMRA, which states in part that "[a] judge shall not lend the prestige of judicial office to advance the private interest of the judge or others." From the plain language of this rule, you may not use your title or position to promote the book to increase sales for either your benefit or that of your publisher. Of course, your name may appear, even though you are known in the community as a XXXXXX judge. Moreover, as part of the description of your personal background, it is also appropriate to state your position as a statement of fact.

The Committee does have some minimal concern, however, with the proposed text of your personal background that you have provided. You have informed us that, following a paragraph that discusses your family and educational background, the proposed text would read:

After clerking for [the XXXXX] he practiced law for over twenty years, first as an associate, then as a partner in the same firm. In late 2005 he was appointed XXXXX court judge by the

Governor. Long before becoming a judge, he found his voice as a poet. Even with a demanding law practice, the early dawn hour would often find him at a table in a dark part of the house, writing out poems in longhand by candlelight. Now with an even more demanding position as a judge, he continues his poetic endeavors, although at shorter intervals before dawn. Over the years, his poetry and short stories have been published in regional journals and anthologies. This is his first book.

Our concern is that this description may unnecessarily highlight your position as a judge. The Committee believes that by calling attention to your becoming a poet long before you became a judge and your "more demanding position as a judge," the personal information may be being used in such a manner as to promote the book, which does not, by your description, involve legal or judicial content. To avoid possible conflict with Rule 21-200, you may wish to state your position in an incidental way, without relating it to your poetry.

We lastly address the other promotional means that you have listed—the internet, literary publications, fliers, and mailings. As commercial publication, you and your publisher have a reasonable expectation that you will be able to promote the book. The restrictions of Rule 21-200 concerning leading the prestige of judicial office to advance private interests should guide your effort. Thus, you should avoid the use of your position to promote the book. However, the Committee believes that if your personal background is included in the promotion, you may list your title in an incidental manner.

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