



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
Hon. Freddie J. Romero

April 21, 2010

Re: Judicial Advisory Opinion No. 10-05

Dear XXX

You have asked whether the XXXXX Court, as manager of the parking facility adjacent to the courthouse, including retail space within that facility, is ethically barred from leasing space to a limited liability company (LLC) whose members include an attorney who personally, and whose law partners, regularly appear before the judges of your court. The LLC proposes to operate a retail coffee shop from this space. Pursuant to NMSA 1978, § 34-8A-14(B) (2000), rental proceeds from the lease of this space are deposited in the court facilities fund, and used to pay principal, interest and other expenses associated with the bonds issued to fund construction of the XXXXXX Court and the parking garage, NMSA 1978, § 34-9-14(B) (2000).

In the opinion of this committee, such a lease is ethically barred because it presents at least an appearance of impropriety, if not an outright conflict of interest, for the judges of the Court who hear this attorney's cases, Rule 21-200(B) NMRA. Specifically, it would improperly put the court in a continuing business relationship with an advocate who frequently appears before the court.

You write that the court has previously declined to lease the commercial

space to businesses whose presence might create a direct conflict of interest, such

as bonding, insurance or law offices. In this situation, the nature of the business to be operated from the space could not itself be perceived to create any conflict, since a retail coffee shop is merely a convenience for the public with no other regular connection to the judicial process. The only issue here is whether the fact that the business is partly owned by an attorney who practices in your court would render a lease arrangement inappropriate.

The problem we see with such an arrangement is that the lease between the court and the LLC that includes this attorney would create an ongoing financial relationship between the court and the attorney, in which the attorney's regular payments on the lease would benefit the court's financial interests. This arrangement could create a public impression that the court has a special interest in that attorney's financial solvency, since it would be using the proceeds of his¹ rental fees to defray court facility costs. As a result, agreeing to locate the attorney as a paying tenant within the facility managed by the court, for the benefit of the court's facility fund, would suggest a special relationship between the attorney and the court that could undermine public confidence in the objectivity of the court's rulings involving that attorney. This could lead some litigants to retain this attorney or his firm on the implicit assumption that the attorney has a special relationship with the court; or to undermine confidence in the court's objectivity among litigants appearing against parties represented by that attorney.

This committee has dealt with analogous situations where an individual judge asked whether it would be ethical to rent office space owned by the judge within their community to counselors who received referrals from the court, AO 01-04; to rent warehouse space to a drug task force, AO 05-04; or where a hearing officer asked about the ethics of selling his home to an attorney regularly appearing before that hearing officer, AO 06-06. In each of these opinions, we concluded that the transactions would be improper because of the appearance it would lend that the property-owning judge or hearing officer could be influenced by the presence of a paying tenant who might appear before that official. We particularly noted that the continuing business relationship each transaction would create between the judge or hearing officer and the tenant would violate Rule 21-500(D) NMRA:

(1) A judge shall not engage in financial and business dealings that:

....

¹ we assume the masculine pronoun herein for convenience

(b) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

The significance of the continuing relationship between landlord and tenant as a basis for barring the transaction was illustrated when the same hearing officer in AO 06-06 subsequently requested an opinion on whether he could sell the home to the attorney using outside financing instead of a real estate contract between buyer and seller, AO 07-06. In that situation, the committee determined that the transaction would not be a violation of the code, so long as it was an arm's-length transaction without special price terms, and the attorney stopped appearing before the hearing officer until the transaction had been completed.

While the financial transaction you have presented does not involve an individual judge managing his personal property but rather the court doing so under its statutory authority as an agency of government, we believe the result is the same. Leasing the commercial space in the court-managed facility to an attorney who regularly appears in the court would impact the court's financial interests just as the individual leases or real estate contract in the prior opinions would give the appearance of potentially influencing the judge's decisions when the lessees appeared in court. Judges are generally obligated to avoid any appearance that they cannot be impartial toward a particular party, regardless of whether that appearance arises from a financial transaction or from other factors, Rule 21-200(B).

Finally, we note that Rule 21-200(B) also precludes lending the prestige of judicial office for private gain. We believe that placing an attorney in physical premises managed by the court for the benefit of the court's operations tacitly signals to defendants or claimants looking for representation that the attorney leasing the court's own space is deemed trustworthy and responsible by the court. Some who are unsophisticated in judicial processes might even assume the lessee attorney to be formally related to the court in some way. The actual and apparent impartiality of the judicial system is too important to risk in this way.

You have also asked for our opinion as to whether the result would be different if the LLC member were not the attorney personally, but rather a member of his immediate family. We assume that the financial implications of having an immediate family member in place of the attorney are the same as those for the attorney himself- i.e., that the attorney would enjoy the same benefits and incur

the same obligations if the immediate family member were the LLC member. We believe that in such a scenario the transaction would be subject to the same concerns as we have raised above, and would be equally barred.

We therefore conclude that to lease the commercial space managed by the Court XXXXX to an attorney who practices in that court would violate the Code of Judicial Conduct.

Very truly yours,

A handwritten signature in black ink, appearing to read "James J. Wechsler". The signature is fluid and cursive, with a prominent initial "J" and a long, sweeping underline.

James J. Wechsler
Chair

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