



## 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

July 19, 2010

### Re: Judicial Advisory Opinion No. 10-06

Dear XXXXXX

You have requested an advisory opinion from the Code of Judicial Conduct Advisory Committee as to whether a county can pay for a new district judge pro tempore to be appointed by the Chief Justice. Your letter explains that the county served by your court convened a committee to study ways to cut costs. This committee reported that delays in scheduling hearings on probation violations are causing the county to incur substantial incarceration costs while defendants remain in jail awaiting hearings. The study found that if a judge pro tempore could be appointed solely to handle such violation hearings, the time and cost of keeping offenders in jail could be reduced. But the only available source for funding this position would be the county itself, which has offered either to contract directly with the new judge, or to contract with the Administrative Office of the Courts (AOC), to hire the judge. Under either arrangement the Chief Justice would appoint the judge pro tempore.

The Committee believes that either arrangement would be acceptable under the Code of Judicial Conduct. While the Code, at Rule 21-500 NMRA, constrains the types and sources of both paid and volunteer service that judges may undertake in addition to their judicial duties, it is silent as to the ethics of the public funding source for the judges' own salaries. This is undoubtedly because New Mexico has long recognized that it is the responsibility of government to pay for the salaries of its judges, *see, e.g.*, N.M. Const, art. VI, §§ 11, 17. While most judges, including district judges, receive their full remuneration from the state, our legislature also provides for counties to pay the municipalities to pay the salaries of municipal judges, NMSA

1978, § 35-14-3 (1961).

Moreover, counties are responsible for providing courthouses for the state judiciary, NMSA 1978, § 4-49-6 (1991).

Presumably, your concern arises from the fact that the same county that will be funding this position has an articulated financial interest in reducing the numbers of persons incarcerated for probation violations and the length of their incarcerations. It might be argued that having the county, with its cost-saving motivation, fund this position rather than the state legislature, as is ordinarily the case for district judges, might make the judge more partial to releasing incarcerated probationers, violating the judge's duty of impartiality under Rule 21-200(B) NMRA. But such an argument would have no greater weight than would the mistaken notion that district judges paid by the state could be influenced in their sentencing decisions by the state's interest in reducing costs of imprisonment.

Nor do we see any plausible conflict because the county may appear before the judges of your court as a party to a lawsuit. Indeed, it might be asserted that because the county pays the salary of one of the judges of your court, the court will be or appear to be biased toward the county because of its interest in preserving its funding source. However, under Section 4-49-6, the county has the obligation to provide courthouse facilities. We believe that the same standard pertains when the county steps up to fund a judicial position that assists the court in fulfilling its constitutional obligation to defendants to provide a timely hearing on the probation violation charge, *State v. Chavez*, 102 N.M. 279, 282, 694 P.2d 927, 930 (Ct. App. 1985). In either case, the county is helping the court to fulfill its legal duty. Neither idea finds any support in the Code of Judicial Conduct as an indicator of judicial bias.

The stated purpose for funding the pro tempore position is to bring alleged probation violators to hearing sooner than has been the case, reducing their waiting time in jail before having their alleged violations adjudicated. The addition of the new judge pro tempore would not necessarily result in more alleged probation violators being released; it would only provide there a speedier hearing on the conditions of their continued release, if any, while they await hearing on pending charges. Access to an additional jurist will do nothing more than afford alleged probation violators a speedy disposition on charges that have left them incarcerated; it will not determine the outcome of that disposition. A defendant has a constitutional right to a timely hearing on his probation violation charge, *Chavez*, 102 N.M. at 282, 694 P.2d at 930 (stating that "delay in the institution and prosecution of probation revocation proceedings along with a showing of prejudice to the probationer, may constitute a denial of due

process").

Although we therefore conclude that the judge may be compensated by the county either directly or through the Administrative Office of the Courts consistently with the requirements of the Code of Judicial Conduct, it might nonetheless be advisable for the county to contract for the judge through the AOC. This more indirect relationship might be less likely to create any arguable appearance of bias, however unsubstantiated such an appearance might be in fact.

This advisory opinion addresses only the implications of the proposed arrangement under the Code of Judicial Conduct. The Committee does not express any opinion as to the legal basis for the courts to establish a pro tempore judicial position of this nature in the absence of statutory authority.

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