



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. 10-07

Dear XXXXXX

You have asked the Advisory Committee on the Code of Judicial Conduct for an advisory opinion as to whether you may handle cases involving the Sheriffs Department in your county because your son-in-law serves as a sergeant in the department. You have explained that he is one of four sergeants and has direct supervisory responsibilities for four deputies. He does not have other supervisory responsibility.

The Committee has issued a recent opinion, Advisory Opinion No. 09-04, concerning a judge's disqualification when her husband serves as a New Mexico State Police Captain in the district served by the judge's court. In that opinion, we concluded that the judge was disqualified and needed to recuse in all cases involving the state police because the judge's impartiality might reasonably be questioned because of her husband's "overall responsibility for the district's operational and administrative functions." We have attached a copy of Advisory Opinion No. 09-04 to this opinion.

As we discussed in Advisory Opinion No. 09-04, the applicable rules to your inquiry are Rule 21-400(A) and (C) NMRA. Under Rule 21-400(A), "[a] judge is disqualified and shall recuse himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Rule 21-400(A) also provides that a judge must recuse if the judge knows that a person within the third degree of

relationship, or the spouse of such person, has "more than [a] de minimis interest that [can] be substantially affected by the proceeding." Rule 21-400(A)(5)(c). Your son-in-law falls within this class of persons. See Rule 21--400(D)(3) (including "daughter" within definition of "third degree of relationship"). The Committee believes that under both of these provisions you would be disqualified, and must recuse, from cases in which your son-in-law or any of his deputies has participated in any manner. Unlike the circumstances discussed in Advisory Opinion No. 09-04, however, you would not need to recuse in other cases involving the Sheriff's Department, even though your son-in-law is an officer in the department, because he does not have administrative responsibility other than for the deputies under his supervision. Even in those remaining cases, you should be sensitive to requests that you recuse yourself because your son-in-law is an officer in the Sheriff's Department. To some people, your son-in-law's position may raise a question of your impartiality with regard to the department and its officers that would be sufficient for you to recuse in that particular case.

In addition, as we discussed in Advisory Opinion No. 09-04, under Rule 21-400(C), you may participate in a case involving your son-in-law or the deputies under his supervision if you disclose on the record the basis for your disqualification and allow the parties and their lawyers to consider, outside of your presence, whether they agree to waive your disqualification and proceed before you. You must make the agreement a part of the record of the case. Rule 21-400(C). As we pointed out in Advisory Opinion 09-04, this waiver of disqualification is generally an option only when a waiving party is represented by counsel. Such waivers are likely to be very rare.

Very truly yours,



James J. Wechsler
Chair

JJW:ow

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