



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

September 27, 2010

Re: Judicial Advisory Opinion No. 10-08

Dear XXX

You have asked the Advisory Committee on the Code of Judicial Conduct for an opinion as to whether you may continue to facilitate drug, alcohol, treatment, and truancy classes at your local high school and middle school now that you have been appointed the municipal judge. You have advised the Committee that you have a contract with the City XXX (City), acting as the fiscal agent to receive DWI grant funds from the State of New Mexico Department of Finance and Administration (DFA) to provide such service. You teach two classes each week when school is in session. One class is on Saturday, and the other is during the noon hour. Students are referred to the class by both the schools and the Juvenile Probation and Parole Department. The class teaches students to make better choices in their lives and to set goals for

themselves that will keep them out of the judicial system. You receive a bi-weekly stipend funded from the DWI grant in the amount of \$323.

The Code of Judicial Conduct permits a judge to teach and participate in extra-judicial activities "concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of the Code. Rule 21-500(B) NMRA. It requires a judge to conduct "the judge's extra judicial activities so that they do 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.

Rule 21-500(A).

The Committee notes the possibility of an issue only with regard to requirements (1) and (3). Requirement (1) pertains to a judge's obligation under the Code to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Rule 21-200(A) NMRA. As you have informed the Committee, the students in your class are typically teens who have had problems with the law or their school. They may have been referred to the class by the Juvenile Probation and Parole office of the district court. Significantly, you sit on a municipal court that does not have jurisdiction over matters that would trigger such a referral. Moreover, you have informed the Committee that your court only has jurisdiction in juvenile matters for traffic violations.

The Committee does not perceive any conflict with your duty to remain impartial by your teaching this class. As you describe it, the purpose of the class is to enable the students to make better choices to improve their lives and stay out of trouble. Such goals are consistent with the activities of the judiciary. However, the Committee does have a concern with the possibility that a student of the class may incur a traffic violation that would require the student to appear before you in your capacity as judge. You have advised that such an occurrence would be rare in that the vast majority of traffic cases involve no contest pleas that are handled by your court's alternate judges. In practice, if students of the class must appear before you

on more than a rare occasion, your appearance of impartiality could be undermined, precluding you from engaging in the teaching activities. At the very least, in the rare occasion in which a student does appear before you, you should consider whether your experience with this student requires you to recuse from the case. *See* 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.").

Requirement (3) raises the issue of your teaching interfering with your judicial duties. You have informed the Committee that the class would not interfere with your judicial duties, that you do not perform your preparation during court hours, and that you do not use any of the resources of the court for your teaching activity. Nevertheless, you must comply with all aspects of the Code in conducting your teaching activity. Rule 21-500(B). Rule 21-500(H) provides:

A judge shall not hold any other paid position, judicial or otherwise, that conflicts with the hours and duties the judge is required to perform for every judicial position. A judge shall devote the number of hours that is required by any judicial position held. In no event shall other paid employment or compensable activity hours be performed simultaneously.

Your judicial position is a full-time position. As a result, because you are paid a stipend for teaching your class, you may not perform any of your responsibilities for the classes during business hours. As long as you teach and perform all of your work for the classes outside of business hours, there does not appear to be a conflict with Rule 21-500(H).

Moreover, Rule 21-600(A) NMRA permits a judge to receive compensation for extra-judicial activities that are permitted by the Code provided that "neither the source nor amount of such [compensation] gives the appearance of influencing the judge's official duties, or otherwise gives the appearance of impropriety." Under Rule 21-600(B), [e]xtra-judicial compensation should not exceed a reasonable amount for the activities performed, and should not exceed what a person who is not a judge would receive for the same activity." Because you have been teaching these classes since 1994, before you were appointed as a judge, it would appear that the amount of your compensation is reasonable and not based on your position as a judge. We note that you must report the stipend as extra judicial compensation under Rule 21-600(B).

As to the source of the stipend that you receive, you have informed the Committee that the City receives funds from DFA that are generated from fines paid by offenders in the courts of the state. *See* NMSA 1978, § 31-12-7(B) (2010) (requiring a municipal court to assess a fee of \$75 "to fund comprehensive community programs for the prevention of driving while under the influence of intoxicating liquor or drugs and for other traffic safety purposes"). The Committee does not believe that this source of indirect funding gives the appearance of influencing your official duties or the appearance of impropriety. First, the source of the funds is not a person or entity that has an interest in cases before your court. Second, even though the original source of funds is through statutorily-mandated court fees, including fees collected in your court, the amount of the fees collected by your court is minimal in that, as you have informed the Committee, your court has only approximately five DWI cases each year. In addition, you do not have any ability to determine the manner in which the fees generated by your court are used, as that decision is entirely within the authority of DFA. Moreover, under the Code, you must be faithful to the law in carrying out your duties in exercising discretion to determine the guilt of persons appearing before you. *See* Judicial Conduct Advisory Opinion 09-03 (copy attached).

The Code permits judges to teach classes in schools subject to the constraints of the Code. The Committee believes that you should be encouraged to do so with the limitations we have discussed in this advisory opinion.

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