



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

November 29, 2010

Re: **Judicial** Advisory Opinion No. 10-09

Dear XXX

You have asked the Advisory Committee on the Code of Judicial Conduct about the propriety of a New Mexico judge mailing letters on his official judicial letterhead inviting recipients to attend a Red Mass. In particular, you have asked whether the use of court stationery and postage for this non-court activity is appropriate, whether the use of the judge's official position in soliciting attendees and title is appropriate, whether the use of the judge's official position and title on promotional materials is appropriate, and whether these issues have any First Amendment Establishment Clause implications.

The Red Mass

The Red Mass is a sectarian religious service—a votive mass of the Holy Spirit—conducted by a Catholic priest. It celebrates the law and the legal profession, and it includes a memorial for those lawyers and judges who have passed away. It was first celebrated in Paris in 1245 and Westminster in 1301, and it is called the "Red Mass" because both liturgical vesture and judicial robes at the time were red. The Red Mass is conducted annually in early October, the beginning of the new term for the traditional common law courts (and, for historical reasons, the beginning of the new term for the United States Supreme Court). As Archbishop Di Noia explained during the homily at the Red Mass in Washington this year, "The celebration of the annual Red Mass signals the profound esteem which the Church has for the

Supreme Court and the legal and judicial institutions of this nation, for the invocation of the Holy Spirit on the occasion springs from nothing other than the trinitarian faith which is at the very center of her faith." *Archbishop J. Augustine Di Noia, Homily at Red Mass, National Catholic Reporter On Line (posted October 3, 2010)*. Members of all religious faiths are encouraged to attend the Red Mass, and members of different faiths participate.

When we view the various aspects of the Red Mass that we have discussed, we observe that although the subject matter of the Red Mass relates in part to the judiciary and the legal profession, the Red Mass is essentially a religious activity. As such, we consider a judge's involvement with, and participation in, the Red Mass as the personal activities of a judge rather than part of the judge's official duties. We analyze the activities with respect to the Code of Judicial Conduct accordingly.

Code of Judicial Conduct

Rule 21-200 NMRA of the Code of Judicial Conduct provides:

A. Respect for the law. A judge shall . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. Impartiality. A judge shall not allow family, social, political or other relationships to influence [a] judge's judicial conduct or judgment. A judge shall not lend the prestige of [the] judicial office to advance the private interest of the judge or others; nor should a judge convey or permit others subject to the judge's direction and control to convey the impression that they are in a special position to influence the judge[.]

Under Rule 21-200(B), a judge may not lend the prestige of the judge's office to advance the private interest of the judge or another. By virtue of Rule 21-200(A), the issue is not only the judge's actual actions, but also the appearances that stem from the judge's actions. Just as it is important that no one suspect that a judge's conduct is designed for the judge's personal financial benefit as precluded by Rule 21-200(B), it is important that no one suspect that a judge will not act impartially by favoring a litigant or witness who comes before that judge because of that litigant's or witness's particular religious, social, or political views or affiliations. Thus, in areas as sensitive as those touching on religion, it is especially important for judges to separate their roles as judges from

other roles they may serve to avoid lending the prestige of judicial office or appearing partial to any religious group. That is not to say that judges, as individuals, are not free to invite friends and colleagues to the Red Mass, or other religious events. However, on the basis of Rule 21-200(A) and (B), they may not use their judicial position to solicit attendance. Moreover, with respect to the use of court stationery and postage, as the Commentary to Rule 21-200(B) explains, "[J]udicial letterhead must not be used for conducting a judge's personal business." As we have discussed, inviting someone to attend a religious service is part of the personal, rather than official, judicial, business of the judge. As a result, the use of the judicial letterhead for such an invitation is not permitted by the Code, regardless of the persons to whom the invitations are sent.

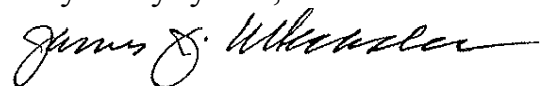
Constitutional Issues

You have also asked whether Constitutional concerns are raised by a judge's use of his title and office in soliciting attendance at a religious service. We note that the United States Supreme Court is divided over the proper test to apply in Establishment Clause cases, and the resolution of legal issues is beyond the scope of this Committee. We thus believe that it is best not to address the issue in this advisory opinion.

Conclusion

The Committee believes that a judge's use of his official position or title to solicit attendance at a religious activity, or on promotional materials of programs for a religious activity, is inappropriate and prohibited by Rule 21-200(B) of the Code of Judicial Conduct because it lends the prestige of the judicial office to a private interest. It further believes that the use of court property in the form of stationery, postage, and similar goods and services, for this non-court activity is inappropriate.

Very truly yours,



James J. Wechsler
Judge

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