



## 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

February 9, 2011

### Re: Judicial Advisory Opinion No. 11-01

Dear XXX

You have asked the Advisory Committee on the Code of Judicial Conduct for an opinion as to whether a retired magistrate judge, who currently serves on a pro-tempore basis, may also hold the position of alternate municipal court judge.

The Code of Judicial Conduct addresses multiple activities of a judge in Rule 21-500 NMRA. Rule 21-500(I) states that "[n]o full-time municipal, magistrate, metropolitan, district or appellate judge may hold any other judicial position, elected or appointed." By its specific language, it does not pertain to part-time judges. As a matter of construction of the rule, we read the inclusion of only full-time judges in the rule to imply the exclusion of part-time judges. *See Vives v. Verzino*, 2009-NMCA-083, ¶ 17, 146 N.M. 673, 213 P.3d 823 (applying the doctrine of *expressio unius est exclusion alterius*-"the expression or inclusion of one thing indicates exclusion of the other"); *H-B-S P'ship v. Aircoa Hospitality Servs., Inc.*, 2008-NMCA-013, ¶ 10, 143 N.M. 404, 176 P.3d 1136 (applying rules of statutory construction to a Supreme Court rule).

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.

Rule 21-500(H) also does not prohibit part-time judges from acting in dual judicial capacities. Moreover, in the first sentence, it implies that a part-time judge may do so, by stating that a judge may not hold a paid, judicial position, if it conflicts with "every" judicial position of the judge.

Thus, the Committee reads these two provisions to allow a retired magistrate judge to act both as a magistrate pro tempore on a part time basis and as an alternate municipal judge. However, as stated in Rule 21-500(H), a retired magistrate may not also act as an alternate municipal judge if there would be any conflict with the hours or duties relating to the judge's service as a magistrate pro tempore.

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