

Advisory Committee on the Code of Judicial Conduct

Hon. Frank H. Allen, Jr. Chairman
Hon. Thomas A. Donnelly
Prof. William T. MacPhearson, Jr.
Hon. Marie A. Baca

September 1, 1998

Honorable

RE: Judicial Advisory Opinion 98-04

Dear

You have requested an opinion from this Committee advising you on whether the joint ownership of an airplane with a local attorney and businessman would violate the Code of Judicial Conduct. You have indicated that, under the proposed arrangement, there would be no profit realized and no income would be generated from this joint ownership; there would be simply a sharing of expenses.

On the facts as presented to us by you, it is unclear whether the proposed conduct would violate Canon 21-500(D) NMRA 1998. If it is likely that the local businessman, attorney or members of the attorney's firm would come before you frequently, your sitting as a judge in cases in which either are involved would violate the Code of Judicial Conduct. There would also probably be a corresponding violation by the attorney of the Rules of Professional Conduct 16-804(G) NMRA 1998.

Canon 21-500(D) of the Code of Judicial Conduct provides as follows:

(1) A judge shall not engage in financial and business dealings that:

...

(b) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

(2) A judge may, subject to the requirements of this Code, hold and manage investments of the judge and members of the judge's family, including real estate, and engage in other remunerative activity.

...

(4) A judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall divest himself or herself of investments and other financial interests that might require frequent disqualification.

The "Commentary" following D(1) provides, in pertinent part:

A judge must avoid financial and business dealings that involve the judge in frequent transactions or continuing business relationships with persons likely to come either before the judge personally or before other judges on the judge's court... This rule is necessary to avoid creating an appearance of exploitation of office or favoritism and to minimize the potential for disqualification.

Although the Code allows a judge to hold and manage investments of the judge, the judge shall not be involved in continuing business relationships with lawyers likely to come before the court on which the judge serves. The judge must avoid investments that result in actual or apparent partiality. Canon 21-500(D)(1)(b); see also Canon 21-500(A)(1) (judge shall conduct his or her extra-judicial activities so as not to cast doubt on the judge's capacity to act impartially).

In our research we found several ethics opinions from other states with similar code provisions concerning judges who enter into financial relations with attorneys or other persons.

An Oregon Advisory Opinion 1991-75 (July 1991) considered two questions: (1) Whether Attorney A may enter into a contract with Judge B pursuant to which Judge-B will regularly use a private airplane owned by Attorney A and (2) whether Attorney C may purchase a vacation home with Judge D. The opinion stated that on the facts presented, the authors could not conclude if the proposed conduct would violate the Code of Judicial Conduct because they could not determine whether there were relationships between the judges and attorneys, respectively. The opinion advised that if the attorneys or members of their firms appeared before the judges, there would be a violation of the Code of Judicial Conduct, but if there was no relationship, there would be no violation.

A New York Advisory Opinion 89-37 (May 11, 1989), concerned a judge who had recently rented, for a one-week period, a vacation home from an attorney whose firm appeared before the

court on approximately four occasions per year. The judge represented that he did not expect to rent the vacation residence on a regular basis. The Committee recommended to the judge that "for a reasonable period in the future you disclose to all parties, whenever this attorney's firm appears before you, the facts concerning this rental, and that for such reasonable period you preside in such a case only if all parties through their attorneys consent in writing or on the record, and that during this period you disqualify yourself should any party object to your so presiding."

In another New York Advisory Opinion 95-01 (January 19, 1995), the Committee advised the full-time judge to divest himself of a piece of investment real property owned jointly with a police officer if the police officer appeared frequently before the judge. However, if the police officer's appearances would be infrequent, the judge was not required to divest the investment; rather, the judge was required to recuse himself or disclose the relationship in matters involving that particular police officer.

In your letter you ask if recusal or disclosure is necessary. Canon 21-500(D)(4) indicates that recusal or disqualification is not sufficient if the attorney or businessman frequently appears before the court, because a judge is required to divest himself or herself of investments and other financial interests that might require frequent disqualification.

In our opinion if it is likely that the local businessman, attorney or members of the attorney's firm will appear before you or other members of your court on a frequent basis, you should not enter into the proposed financial arrangement. The Code does not distinguish between the fact that there is neither a profit motive nor income being generated.

On the other hand, if the attorney or businessman seldom or rarely appear before the court, there would be no violation of Canon 21-500(D)(4). In such case, if the local businessman, attorney or members of the attorney's firm do appear before you on such infrequent occasions, you would be required to either recuse yourself, or to make full disclosure of the situation to all interested parties and determine if the parties are willing to waive any objections pursuant to Canon 21-400(C) 1998.

Very truly yours,

Frank H. Allen, Jr.
Chairman
Judicial Advisory Committee