

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

January 13, 1999

The Honorable

Re: Judicial Advisory Opinion 99-01

Dear Judge

The Committee is in receipt of your letter dated December 14, 1998, requesting an Advisory Opinion as to whether several business ventures that you and your husband are currently engaged in would constitute conflicts of interest with your duties as a _____ Judge.

According to your letter, you and your husband are independent agents or associates marketing legal service plans for _____ working on a commission basis. You have indicated that _____ designs, underwrites, and markets legal plans which provide a variety of legal services to purchasers in New Mexico and other states. Additionally, you have stated that you and your husband operate a ranch in _____ New Mexico.

Specifically, you have posed the following questions:

- 1) Can my husband continue the _____ business as an ongoing concern for himself personally?
- 2) For estate planning purposes, can my name remain on the business application as the spouse?
- 3) Can [my husband] continue to operate the _____ division for _____?
- 4) Can [my husband] continue to sell the _____ product and/or associate memberships within the county under either his personal associate membership or _____ associate membership?
- 5) Is there a conflict if business is conducted out of _____ County?
- 6) Is there a conflict if business is conducted out of the State of New Mexico?
- 7) Is there a conflict should a litigant appear before me in _____ Court represented by the _____ provider law firm?
- 8) Please advise on any other issues you feel are relevant.

Based on the facts as presented to us by you, three Canons of the Code of Judicial Conduct adopted by our Supreme Court are pertinent to your several inquiries.

Canon 21-500 provides in part, as follows:

A. **Extra-judicial activities in general.** A judge shall conduct all of 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;

D. **Financial Activities.**

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

(a) may reasonably be perceived to exploit the judge's judicial position; or

(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.

Canon 21-400 states in part:

A. **Recusal.** A judge is disqualified and shall recuse himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(3) the judge knows that he or she ... or the judge's spouse ... has an economic interest in the subject matter of the controversy...

Canon 21-200 provides in applicable part:

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 the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interest of the judge or others... to convey the impression that they are in a special position to influence the judge.

Based upon the provisions of the above Canons of the Code of Judicial Conduct, it is our opinion that the answers to the questions posed by you are as follows:

1. If you or your husband continue to act as an agent or associate of _____, you should recuse yourself in any case where the company provides legal services related to a legal proceeding which comes before you as a _____ Judge. See Canons 21-200; 21-400; 21-500. Alternatively, under Canon 21-400 (C), which provides:

A judge disqualified by the terms of Paragraph A of this rule may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

Additionally, even if you no longer continue to remain as an associate or agent of _____, if your husband continues to act as an associate, you would continue to have an indirect interest in the proceeds of such business under New Mexico's community property laws. This would require you to recuse yourself or follow the provisions of Canon 21-400 (C).

2. We conclude that the provisions of Canon 21-500(A) and (D) generally direct that you not continue to act as an agent or associate of _____, or to lend your name to such business while serving as a judge. Id. The Commentary to Canon 21-500(D)(1) further provides that "[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. In addition, the judge should discourage members of the judge's family from engaging in dealings that would reasonably appear to exploit the judge's judicial position."

3. Our response to your third question is the same as our answer to No. 1.

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4. Our response to your fourth question is the same as our answer to No. 1.

5. In our opinion, if you remain an agent or associate of _____, the provisions of Canon 21-500(D) (1) (a) would be implicated, even if memberships are solicited outside the area wherein you serve as a _____ judge. Id.

6 Our response to your sixth question is the same as No. 5.

7 Our response to your seventh question is the same as No.1

8 Our response to your eighth question is the same as No. 1.

Very truly yours

Frank H. Allen, Jr.
Chairman
Judicial Advisory Committee