

Advisory Committee on the Code of Judicial Conduct

Hon. Frank H. Allen, Jr., Chairman
Hon. Marie Baca
Hon. Thomas A. Donnelly

April 27, 1999

Re: Judicial Advisory Opinion 99-05

Dear

You have asked this committee to advise you as to whether or not a judge may sit on a case in which an organization of which the judge is a member appears as amicus curiae.

There are praiseworthy and civic minded organizations that judges are prohibited from membership by the Code of Judicial Conduct. Obviously, if a judge is a member of an organization that the Code prohibits membership in, he should not sit on a case in which the organization appears as amicus curiae. Although the general rules concerning membership by the judiciary in extra-judicial and charitable organizations is set out in the Code, it is difficult sometimes to apply these rules to specific organizations.

A judge may not engage in any activities that "(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 constitution of the United States and the State of New Mexico." Rule 21-500 NMRA 1999. In addition, a "judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin." Rule 21-200 NMRA 1999. Further, a judge may not serve an organization that will likely "be engaged in proceedings that will come before the judge; or. . .be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member." Rule 21-500 NMRA 1999.

Case law does not define the type of civic or charitable activity that may present the appearance of impropriety. See Jeffrey M. Shaman et. al., Judicial Conduct & Ethics § 9.11 , at 296 (2d ed. 1995). A judge is encouraged to "contribute to the improvement of the law, the legal

system, and the administration of justice. ..either independently, or through a bar association, judicial conference or organization dedicated to the improvement of the law." Rule 21-500 cmt. ¶ B NMRA 1999. The Code provides, however, that judges abstain from membership in organizations even if they do not ordinarily come before the judge if their membership in the organization would "cast doubt on the judge's capacity to act impartially as a judge." Rule 21-500 NMRA 1999. "[J]udges should avoid membership in even the most praiseworthy and noncontroversial organizations if they espouse or are dedicated to a particular legal philosophy or position." Shaman et. al., supra, at 297. Specifically, judicial ethics opinions have made the following determinations with respect to judicial membership in organizations:

Arizona 95-2. A judge may not be a member of the National Association for Criminal Defense Attorneys or the Arizona Attorneys for Criminal Justice because "[m]embership in organizations that represent particular groups of attorneys, as opposed to the bar in general, would reflect adversely upon the impartiality of a judge and would not promote judicial confidence in the integrity and independence of the judiciary ."

Alabama 81-117. A judge may become a member of the American Arbitration Association. However, the judge would be precluded from acting as an arbitrator or mediator in any case.

Federal Advisory Committee on Judicial Activities, Op. No.28. A judge may not serve as a director, officer or member of national, regional or local organizations, "which are present or potential litigants in the federal courts or are the promoters, sponsors or finances or organizations sponsoring litigation in the federal court." Also, "judges should avoid membership in plaintiff or defense oriented bar associations."

Florida 80-8. A judge may belong to the American Academy of Matrimonial Lawyers.

Florida 82-18. A judge may not serve on the board of directors of MADD because the judge's impartiality would be questioned in DWI cases.

Florida 95-46. A judge may be a member of the American Board of Trial Advocates, where the membership was evenly split between plaintiffs' and defendants' lawyers.

Georgia Opinion 98. A judge may not be a dues-paying member of a plaintiffs' or defendants' trial lawyers association because membership in such groups would reflect adversely on the impartiality of a judge.

New Mexico 88-8. A judge should not serve as co-chairman of a national committee for the racing industry. The judge's capacity to impartially decide cases dealing with the racing industry might detract from the judicial office because of the importance of the industry to the State.

New York 88-18. A judge may be an active member of a society of Jewish attorneys.

Oregon 78-4. A judge may not join the advisory board of an anti-shoplifting organization because unlike organizations devoted to the improvement of the legal system this organization has a narrow advocacy function which will create an appearance of impropriety.

Oregon 82-1. A part-time municipal judge may not serve as a member of the board of directors for a civil liberties organization because the organization regularly engages in adversary proceedings in various courts.

West Virginia (March 4, 1997). A judge may belong to the American Academy of Matrimonial Lawyers, which is comprised of plaintiffs' and defendants' attorneys.

In an article found in the Judges Journal, Spring 1992 entitled What Role Should Judges Play in the ABA the question of judges participation in case wherein the ABA filed amicus briefs was discussed. The Article indicated that from 1980 through 1990, the ABA filed 50 amicus briefs, 38 of them in the United States Supreme Court. After deciding that a judge could properly belong to the ABA, the article recommends that a judicial member of the ABA should not participate in anyway in the formulation or adoption of a policy, including by voting on the policy, if the policy concerns an issue on which the judge could not properly comment publicly in the judges own name.*

Membership in a bar association is permissible as the organization is comprised of both plaintiffs' and defendant's attorneys, does not practice invidious discrimination, the organization does not advocate legal positions as its primary function, it is not embroiled in controversial issues and it would not ordinarily appear before the court of which the judge is a member or any court subject to the appellate jurisdiction of the court of which the judge is a member.

Assuming that the organization is one of which a judge may be a member we then need to determine whether a judge who is in a leadership position in the organization may sit on a case in which the organization appears as amicus curiae. In Florida Advisory Opinion 84-13, the committee determined that a judge may serve as chairman-elect for the family law section of the bar as long as this position did not necessitate involvement in political activities, such as legislative lobbying. The opinion noted that the family law section had been actively filing amicus briefs with the approval of the board of governors of the bar. The opinion advised that the judge should avoid direct involvement in that section' s activities which would reflect adversely on his/her impartiality, but that the judge could "conceivably participate in some types of amicus activities." The Florida opinion did not consider the issue of whether a judge could sit on a panel in which an organization of which he/she was a member proposed to file an amicus brief nor have any other judicial advisory opinions or commentary. An overriding concern of the Code of Judicial Conduct is maintaining the integrity of the judicial system by avoiding even the appearance of impropriety. Certainly, a judge could not participate, advise or advocate the

crafting of an amicus brief that would be filed in a case that could come before a court subject to the appellate jurisdiction of the court of which the judge is a member. It would seem, however, that short of such involvement the determination of whether a judge may sit on a panel in which an organization of which he is a member proposes to file an amicus brief would depend on the following non-exhaustive factors, in addition to the considerations outlined in Canon 21-400:

- Is the judge a member or does he/she hold a leadership position?
- Does the amicus brief address a controversial issue, advocate invidious discrimination, demean the judicial office, or is the position contrary to the law?
- Will the judge's membership in the organization and involvement in the opinion call into question the public confidence in the integrity and impartiality of the judiciary?
- What is the strength of the relationship between the judge and the organization?

In sum, the determination is fact specific and will depend on the particular circumstances of each case.

Sincerely,

Frank H. Allen, Jr.
Chairman
Judicial Advisory Committee

*A disclaimer which is used by the ABA amicus briefs is as follows:

Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. Nor should any inference be drawn that any judicial member has participated in the adoption of or endorsed the positions taken in this brief. This brief has not been circulated to any judicial members of the ABA prior to filing.