

# Advisory Committee on the Code of Judicial Conduct

Hon. James J. Wechsler, Chair  
Hon. Marie A. Baca  
Hon. Kevin L. Fitzwater  
Paul L. Biderman, Esq.  
Prof. Robert L. Schwartz

June 16, 2006

## Re: Judicial Advisory Opinion No. 06-03

Dear

You have requested an opinion from the Advisory Committee on the Code of Judicial Conduct as to whether a municipal judge must recuse from all cases filed by the City under circumstances in which the municipal judge has engaged in certain litigation with city officials. Before responding to your inquiry, the Committee notes the unusual situation underlying your request, and the possibility that our response might become public within your community. Indeed, your correspondence suggests that you may decide to release this letter to the public yourself to provide our, independent opinion as to whether you are required to recuse yourself, and it is certainly your prerogative to do so. Since, in this respect, this advisory letter may deviate from the normal circumstances under which we issue letters, we first explain our procedure and purpose for potential readers from outside the judiciary.

The Advisory Committee on the Code of Judicial Conduct is a Supreme Court-appointed body comprised of judges and faculty of the University of New Mexico School of Law. Our sole responsibility is to respond to inquiries from judges as to their obligations under the New Mexico Code of Judicial Conduct, Rules 21-100 to 21-901 NMRA. The Committee offers only its best advice and only to judges subject to the superintending control of the New Mexico Supreme Court. Our duty is to respond in confidence and not reveal the source of any inquiry, to ensure that no judge is deterred by threat of adverse publicity from making inquiries. The Committee has no authority to require any judge to take or refrain from taking any action, nor can we investigate any charges of misconduct or discipline any judge. Because the Committee has been created as an advisory service to judges, we do not attempt to ascertain facts independently, but rather analyze the facts assuming they are exactly as presented to us in each judge's letter of inquiry.

With these limitations in mind, we turn to the circumstances you have stated in your request. You have stated that you have been asked by the city attorney to recuse yourself from all cases filed by the City in your court because you have filed suit against the City and certain of its officials, including the city attorney. Your lawsuit arises from previous proceedings in which two assistant city attorneys filed complaints against you

with the Judicial Standards Commission (which *does* investigate allegations of judicial misconduct and recommends discipline). These attorneys' complaints, involving written and oral communications made by you in your official capacity, were ultimately heard and disposed of by the New Mexico Supreme Court. The attorneys who complained against you no longer work for the City. Your letter notes the significant personal expense you incurred in defending those proceedings, and further indicates that the City did not request your recusal at any time during the pendency of the proceedings. Because your request does not otherwise address those proceedings, and because the city attorney did not reference them, or their underlying history, as a reason for his request, we do not consider them in our analysis.

As a result of those proceedings, you recently filed a lawsuit against the City, alleging that the City had a duty to provide counsel to municipal judges sued for actions taken in their official capacity, or alternatively to reimburse you for your considerable expense in retaining your own counsel. You did not provide the Committee with a copy of the lawsuit, but you indicate that you named the city attorney as a defendant in the lawsuit in his official capacity, but not in his personal or individual capacity. We assume from your letter that you named him to facilitate the relief you requested in the lawsuit. Within days of your filing the lawsuit, the city attorney delivered a letter requesting your voluntary recusal from all cases in which the office of city attorney enters an appearance based on Rule 21-400(A)(1) of the Code of Judicial Conduct. Subsequently, the city attorney's office has filed a number of notices of recusal in individual cases pending in your court. You state in your letter, however, that the city attorney, who is the named defendant, does not personally appear in your court, and that the assistant city attorneys who filed the complaints with the Judicial Standards Commission are no longer employed by the City. As justification, the letter requesting your recusal alleges your actual and/or apparent prejudice against the city attorney by virtue of the lawsuit, but you deny harboring any such inclinations.

Your question to this Committee is whether, under these circumstances, you are required to recuse in cases in which the office of the city attorney has entered an appearance on behalf of the City. We do not believe that your lawsuit requires you to do so.

Rule 21-400(A)(1) provides:

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:

- (1) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding[.]

In discussing similar language in a former version of the Code of Judicial Conduct, our Supreme Court stated that a judge has a duty to perform the judge's judicial

functions that is "equally as strong" as the duty to not sit on a case in which the judge is disqualified. *Gerety v. Demers*, 92 N.M. 396, 400, 589 P.2d 180,184 (1978). According to our Supreme court, "[r]ecusal should be used only for the most compelling reasons." *Id.* at 400, 589 P.2d at 184.

The test under Rule 21-400(A) of whether a judge's impartiality might reasonably be questioned is an objective one. *See* Jeffrey M. Shaman, Steven Lubet & James J. Alfani, *Judicial Conduct and Ethics* § 4.25, at 154-55 (3d ed. 2000) ("The test for an appearance of partiality is meant to be an objective one: whether an objective, disinterested observer fully informed of the relevant facts would entertain a significant doubt that the judge in question was impartial."). Because you state that you do not harbor any personal prejudice against the city attorney, we must examine whether your impartiality might reasonably be questioned because of the lawsuit such that a reasonable person, with knowledge of the circumstances, would question your ability to be impartial, compelling your recusal. We do so in the context of your position and the nature of the lawsuit you have filed.

As a municipal judge, it is your responsibility to adjudicate all cases brought by the City for violation of its municipal code. Necessarily, the City is a party and is represented by the office of the city attorney. You have indicated that there are numerous such cases pending.

You brought your lawsuit because of your position as municipal judge against city officials, including the city attorney, in their official capacity. The underlying facts arise from complaints about performance of your judicial responsibilities. You allege that you were entitled to have the City provide you with a defense in the proceedings against you before the Judicial Standards Commission, or alternatively, that the City should reimburse you for the legal expenses you personally incurred because it failed to fulfill its obligation to provide a defense. As you have described it, your lawsuit is your attempt to define the obligations of the City-toward its judicial officers when complaints are filed against them for actions taken in their official capacity. Your lawsuit attempts to resolve an issue that bears upon fundamental issues arising from our constitutional separation of powers and the independence of the judicial branch.

While this Committee expresses no judgment as to the merits of your lawsuit, we do not believe that, under objective review, it is reasonable to infer prejudice on your part, or raise the question of your inability to be impartial, from the fact that you have named the city attorney as a party defendant to your lawsuit, if your naming him as a defendant can be viewed as facilitating the relief the lawsuit seeks. It is well recognized in the law that an individual government official may be named in a lawsuit as a defendant in his or her official capacity. *See Ford v. N.M. Dep't of Pub. Safety*, 119 N.M. 405, 410-11, 891 P.2d 546, 551-52 (Ct. App. 1994). It is not reasonable to infer personal prejudice against an official so named in order to obtain legal redress. You have denied any personal feelings of antipathy toward the city attorney. Assuming that the city attorney was named to legitimately advance the lawsuit, we do not believe that it can be reasonably inferred that any feelings resulting from being on opposite sides of the lawsuit

would lead you to systematically disregard your judicial duties to provide a fair and impartial forum for all cases filed by the office of the city attorney, which cases comprise a significant portion of your caseload.

Policy reasons support our opinion that your perceived necessity to resort to judicial process to resolve this dispute between you and the city administration does not require your recusal under Rule 21-400(A) from the individual cases that the City has pending in your court. The judicial system exists to resolve legal disputes, and for a judge to seek to utilize the processes and remedies afforded by law to resolve an official dispute should not, itself, be the cause for mandatory recusal of that judge from a major portion of the judge's caseload. Were this true, a judge who had in fact suffered from official misconduct, however egregious, would be faced with an unconscionable choice. For the judge to seek legal redress for a legitimate dispute among public officials, the judge would have to, in effect, relinquish the judge's job of hearing cases associated with the officials who had committed the actionable misconduct, at least for the pendency of the lawsuit. We cannot imagine our Code of Judicial Conduct having intended such a result, particularly when the officials represent the city for which you are the elected municipal judge.

This Committee has previously addressed, under the former Code of Judicial Conduct, other circumstances in which district judges had filed a lawsuit against government officials. Advisory Opinion No. 89-8. We addressed the question of whether the judges were required to recuse when presiding on unrelated cases involving attorneys either representing the judges or the opposing county officials in the lawsuit. *Id.* We stated the opinion that the judges were not required to withdraw merely because of the representation of the attorneys in the judges' lawsuit. *Id.* We stated that the judges should disclose the representation to the parties and attorneys in the pending case to determine whether there was objection. *Id.*

Your request is different in two significant respects. First, the attorneys in Advisory Opinion No. 89-8 played an active role in both the official lawsuit and the pending case, as opposed to the city attorney who is not active in the cases in your court. *Id.* Second, there is no indication in Advisory Opinion No. 89-8 that the attorneys were representing the county in the unrelated pending cases, such that the parties could decide that they did not object to the judges' participation in the cases. *Id.* In your request, the office of the city attorney always represents the City, any perceived prejudice will always run against the City, and, by the city attorney's request for your recusal, it has objected to your participation in any of its cases.

The opinion of the Committee, based on the circumstances you have described, is that you are not required to recuse in all cases filed by the office of the city attorney merely because of your lawsuit.

Very truly yours,



James J. Wechsler

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cc: Hon. Marie A. Baca  
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