Advisory Committee on the Code of Judicial Conduct

January 20, 2009

Re: Judicial Advisory Opinion No. 09-01

You have asked the Advisory Committee on the Code of Judicial Conduct for guidance on whether, and under what conditions, you can submit an essay for publication in a national magazine. Your essay reflects on your experience in your own same sex relationship, the rights that remain unavailable to same sex partners, and the personal support and limitations you have experienced in your relationship. It concludes by criticizing the decision by the President-elect to call upon a minister who is hostile to gay rights to deliver an invocation at the presidential inauguration. Your biographical reference at the conclusion of the article, required by the magazine, states that you are a district court judge for the state of New Mexico.

The Committee believes that the Constitution and the Code of Judicial Conduct protect your rights to publish your essay, although it is imaginable that doing so may restrict your ability to preside over cases that directly raise the subject matter of your essay.

As adopted by the New Mexico Supreme Court, the Code of Judicial Conduct supports a broad right of judges to publicly express their opinions. Rule 21-500(B) NMRA expressly permits a judge to "speak, write, lecture, teach and participate in other extra judicial activities concerning the law, the legal system, the administration of justice *and non-legal subjects,* subject to the requirements of this Code. (Emphasis added.) By adding "non-legal subjects," the New Mexico version went beyond the language of the rule drafted by the American Bar Association in its 1990 Model Code, on which our state's rules are generally based. The Committee believes

that this addition indicated the intention of our Supreme Court to acknowledge constitutional rights of judges to speak out on issues, not limited to matters involving the law.

The subsequent ruling of the U.S. Supreme Court in *Republican Party of Minnesota v. White, 536* U.S. *765 (2002),* confirms this conclusion. The Court in *White* struck down the ethical prohibition ("the announce clause") against judges' expressing their opinions on legal subjects during their election campaigns. While the Court's opinion was addressed toward protecting the integrity of the electoral, process and the right of the electorate to know the opinions of judicial candidates, much of the Court's rationale and language equally support the existence of a broad right of free speech for the judiciary. For example, the *White* Court rejects concerns cited in support of the Minnesota ethics code that judges' public statements on policy issues during election campaigns might undermine public confidence in judicial impartiality. The Court distinguishes campaign statements expressing judicial opinions on *issues,* which are protected speech, from statements expressing preferences among particular *parties,* which may be prohibited to ensure fair judicial processes. The Court also recognizes that judges are not viewed as having to assume the bench as blank slates, but rather *are* expected to bring their experience and values with them to the bench-values which the electorate is entitled to know about judges subject to election. You are not obliged to hide your same sex status, or the consequences it has had upon your life, just because you are a judge.

The permissive language of Rule 21-500(B) is qualified by the requirement that the judge's conduct is "subject to the requirements of this Code." Rule 21-400(A) NMRA requires recusal when "the judge's impartiality might reasonably be questioned." Rule 21-400(A)(6) specifically requires the judge to recuse from a proceeding after making public statements that result in the judge having committed, or having appeared to commit, with respect to an issue or controversy in the proceeding or the controversy. This requirement does not arise out of concern for a judge's personal beliefs or the subject of those beliefs, but rather from the potential impact of the judge's published views on the litigants' perception of judicial impartiality. However, the commentary to Rule 21-400(A)(6) also notes that this provision "is not intended to limit any comment allowed under Rule 21-500." As we noted above, that rule permits the judge to speak publicly on any issue, but "subject to the requirements of this Code." Still, if you are called upon to rule on the legal status of a same sex relationship under New Mexico law, for example, you may be required to recuse. We believe that you would have to exercise such action on a case - by-case basis, in the unlikely event that a relevant case should ever come before you.

In addition, Rule 21-200(B) NMRA prohibits judges from using "the prestige of judicial office to advance the private interest of the judge or others." When judges use

the prestige of their office to advance private agendas, they undermine the integrity of the judiciary by using their power toward ends potentially inconsistent with their public responsibilities. Your article calls for certain gay rights and criticizes the incoming president's choice of inauguration speaker, which appear to us to be opinions on matters of public rather than private interests. The Committee nonetheless suggests you attach a disclaimer, to the effect that "the views expressed in this article are those of the author and not the court on which she serves or any branch of New Mexico government." We would also suggest that you write the article on your personal stationery and sign it with your name without listing your status as a district judge in your signature.

Very truly yours,

James J. Wechsler
Chair

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cc: Hon. Kevin Fitzwater
Paul Biderman, IPL Director
Professor Robert L. Schwartz