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Advisory Committee on the Code of Judicial Conduct

Hon. James J. Wechsler, Chair
~~XXXXXXXXXXXX~~
Hon. Kevin L. Fitzwater
Paul L. Biderman, Esq.
Prof. Robert L. Schwartz
Hon. Freddie J. Romero

January 7, 2013

[REDACTED]

Re: Judicial Advisory Opinion No. 13-01

Dear [REDACTED]

You have been appointed as a magistrate judge and have yet to assume your position. You have three areas of inquiry for the Advisory Committee on the Code of Judicial Conduct: (1) the financial arrangement that you have formed with an attorney concerning your existing cases; (2) a pending case between you and another attorney; and (3) the effect of your disqualification on the other judge in the court.

Financial Arrangement

You are the only attorney with a specialized collection practice in southern New Mexico and serve approximately fifty to sixty clients, consisting primarily of insurance companies and collection agencies. You have approximately 1,200 open, active cases. In addition, you have approximately 5-7,000 cases for which a judgment has been issued within fourteen years and payment is not presently being collected. The period for enforcement of a money judgment is fourteen years. NMSA 1978, § 39-1-6 (1983).

You have formed an agreement with an attorney to take over your practice by which you will transfer your entire practice to this attorney, subject to your clients'

approval with respect to their cases. In exchange, he will honor the terms of all agreements with clients and perform the work necessary on their cases. You will receive the full share of your fees for your open, contingent fee cases in which there is a valid judgment and the defendant is paying either voluntarily or involuntarily by garnishment or wage withholding. For the other cases, you will receive one-third of the attorney fees received in addition to all costs recovered prior to the transfer of the case. The attorney will run these recoveries through his trust account and disburse the appropriate amounts to you in a separate, non-trust account. This non-trust account will be used to pay taxes and to supplement the costs of an office staff member to handle the account. Remaining funds will be disbursed to you. You will not control the law practice in any way.

Generally, a newly-appointed judge may transfer or sell the judge's practice provided that the judge complies with the Rules of Professional Conduct and the Code of Judicial Conduct. In this regard, the Committee suggests that you review those rules, in particular, Rule 16-116 NMRA (concerning terminating representation) and Rule 16-117 NMRA (concerning sale of a law practice). Significant to your transition is that you may not practice law once you have assumed judicial office. Rule 21-310 NMRA. You may, however, receive compensation for work previously performed. For contingent fee cases, it is recommended that a new judge enter an agreement, as you have, at the time the judge takes the bench based on a reasonable estimate. Alfini, Lubet, Shaman, and Geyh, *Judicial Conduct and Ethics* ¶ 7.10A (4th ed. 2007).

It is also recommended that a judge avoid maintaining economic ties to the judge's former practice. *Id.* The Code of Judicial Conduct requires a judge to "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary." Rule 21-102 NMRA. A judge is further expected to refrain from business activities that will lead to the judge's frequent disqualification or will involve a continuing business relationship with an attorney. Rule 21-311(C)(2), (3) NMRA. The best way to avoid such concerns is to require or encourage a new judge to liquidate the judge's financial interest in a former practice in a reasonably short period of time.

Viewed in this context, the period that you have established extending to fourteen years is lengthy. However, New Mexico does not have any bright-line rule. The Committee considers the appropriate period of time to be one that is reasonable

under the circumstances. The circumstances that you set forth include your investment in the cases, the period of fourteen years that the cases may take to play out, and your intent to disqualify yourself in any cases involving the attorney who is taking over the cases as well as any clients in the cases. In addition, you note that eighty percent of your cases are outside your county and, within your county, the attorney may file cases in the other three divisions of your court that are not located in your city.

You are correct in concluding that you must disqualify yourself in any case involving the attorney or the clients with existing cases. Rule 21-211 NMRA requires a judge to “disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned[.]” The rule specifically includes situations in which the judge has personal knowledge of the facts in dispute, has acted as a lawyer in the case, has more than a de minimis interest that could be affected, or has a personal bias concerning a party’s lawyer.

Under these circumstances, it is reasonable that you cannot liquidate your interest in your law practice within a short period of time. Not only will the cases take time to complete, but you will need to continue a financial relationship with the attorney until he is able to attain financial independence in the practice. However, the Committee does not believe that it is reasonable for you to continue in this manner for fourteen years. Rather, the Committee believes that you reasonably can, and should, liquidate your interest in the practice and terminate your agreement with the attorney within a five-year period.

Pending Case Against Another Attorney

You have an unpaid money judgment for sanctions ordered by a district court judge against another attorney in your judicial district. It is currently in the execution stage. The attorney has a public defender contract and has cases that will come before the court in which you will serve. Although you do not believe that you will have any difficulty acting impartially in cases involving this attorney, you intend to disqualify yourself in any of his cases until after the judgment is collected in full or the matter is completely resolved.

As discussed above, Rule 21-211(A) requires you to disqualify yourself in any case in which your “impartiality might reasonably be questioned.” You have described the judgment against the attorney as involving sanctions and disciplinary

action. Because of the nature of the judgment as well as its financial aspect, Rule 21-211(A) would require your disqualification at least until the matter is finally resolved. Your disqualification thereafter depends not only on your subjective belief that you can act in an impartial manner but also on whether there is reasonably a continuing question at that time as to your impartiality. You will need to assess those circumstances at that time based on the seriousness of the issues between you and the events that transpire in the course of the execution and related proceedings.

Effect on Other Judge in the Court

You have asked the related question concerning disqualification of whether the other judge in the court in which you will serve will need to disqualify himself in cases in which you are disqualified. He does not. Rule 21-211 pertains only to the individual judge whose impartiality might reasonably be questioned. Unless there are reasons particular to that judge that bear on his ability to hear a case, the fact that you are disqualified does not disqualify the other judge on the court.

Very truly yours,



James J. Wechsler
Chair

JJW:ow

cc: Hon. Kevin L. Fitzwater
Hon. Freddie J. Romero
Paul L. Biderman
Professor Robert L. Schwartz