Advisory Committee on the Code of Judicial Conduct

December 29, 1997

RE: Judicial Advisory Opinion 97-08

Dear

You indicated to us by your letter of November 20, 1997 that you have two judicial conduct questions on which you seek the Committee's advice.

First, you asked whether you must recuse yourself--and if so, for how long--from cases where the attorney of record is a former associate in the firm in which you practiced before joining the bench. From your letter, we understand that you left the firm in July 1995 when you were appointed to the District Court and that the associate left the firm this summer and is now practicing with another attorney in a different city.

Second, you inquired whether you must recuse yourself--and if so, for how long—when the particular attorney of record in a case was your opponent in last year's contested election for your position as district judge. You indicate that more than a year has passed since the election and that you have been recusing yourself out of such cases during this time.

Two provisions of the Code of Judicial Conduct are applicable to both of these questions. Rule 21-400(A), NMRA 1997 provides in pertinent part:

> 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 …;
>
> 2) ...a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter. ...[Emphasis added.]

Rule 21-200, NMRA 1997, which requires a judge to avoid impropriety and the appearance of impropriety, is also relevant to these questions.

Regarding your first question, we do not believe Rule 21-400(A)(2) requires you to recuse yourself from cases in which your former associate is the attorney of record, except on cases if any, that the associate has brought with him from your old firm and which were handled by the firm at the time you were there. This caveat does not appear to be implicated in your situation because you indicated in your letter that the associate, in his new practice, has "taken over" some cases that were assigned to be heard by you, rather than bringing prior client matters before you in his new capacity as a lawyer in a different law office.

Nor do we believe under the facts presented here that Rule 21-200 prevents you from hearing cases brought by your former associate. We have previously suggested in another advisory opinion that a judge should recuse himself or herself from cases involving a former partner or associate for a period of five years after disassociation in order to avoid the appearance of impropriety "especially to the public." See Judicial Advisory Op. No.89-6 (enclosed). Here, however, the concern over an appearance of impropriety in the eyes of the public is largely absent because your former associate is no longer with your old firm, but instead is practicing in a different law office in a different city. Nonetheless, as a safeguard of the ethical integrity of your judicial office, we recommend that you disclose your relationship with your former associate to all interested parties, see Judicial Advisory Op. Nos. 95-4 and 94-06 (enclosed), who may then decide whether to seek your excusal pursuant to Rule 1-088.1, NMRA 1997 or Rule 5-106, NMRA 1997.

Regarding your second question, we do not believe, on the facts provided in your letter, that you must recuse yourself from cases in which your former opponent for the judicial position you now hold is the attorney of record. Rule 21-400(A)(1) requires recusal where a judge has a personal bias or prejudice. Such bias or prejudice must be "actual or apparent." Valladares v. Second Judicial Dist. Court of Nevada, 910 P.2d 256, 260 (Nev. 1996) (per curiam); see also Roybal v. Morris. 100 N.M. 305, 308, 669 P.2d 1100, 1103 (Ct. App. 1983) ("Suspicion of bias or prejudice is not enough to disqualify a judge. ") (emphasis added). Your letter states no facts to suggest that you have actual or apparent bias against your former opponent. Hence, we see no impropriety or appearance of impropriety under Rule 21-200 in your hearing cases brought by this attorney.

Very truly yours,

Frank H. Allen, Jr.
Chairman, Judicial Advisory Committee

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