Opinion No. 70-100

December 17, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: The Albuquerque City Commission Frank Horan, City Attorney Harry D. Robins, Municipal Judge John C. Duffy, Acting Police Chief

QUESTIONS

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1. Can a municipal judge be disqualified?

2. If the answer to the above is in the affirmative, under what circumstances may such a disqualification be effected?

CONCLUSIONS

1. Yes.

2. See Analysis.

OPINION

*{*175}* **ANALYSIS**

Opinion of the Attorney General No. 59-207, issued December 17, 1959, considered the issue presented by the first question. That opinion concluded municipal judges could be disqualified. In the light of subsequent developments, this opinion should be considered as clarifying No. 59-207.

Any consideration of whether a member of the judiciary can be disqualified must begin with an examination of our State Constitution Art. VI, **§** 18, as amended in 1966, which reads as follows:

No justice, judge or magistrate of any court shall, except by consent of all parties, sit in any cause in which either of the parties are related to him by affinity or consanguinity within the degree of first cousin, or in which he was counsel, or in the trial of which he presided in any inferior court, or in which he has an interest.

The nature of the disqualification of judges contemplated by this provision was discussed in **Beall v. Reidy,** 80 N.M. 444, 457 P.2d 376 (1969):

Except by consent of all parties, a judge is disqualified to sit in the trial of a case if he comes within any of the grounds for disqualification named in N.M. Const., Art. VI, **§** 18.

But the disqualification on the named grounds found in the constitutional provision is apparently not automatic, as the following language from **State v. Miller,** 79 N.M. 392, 444 P.2d 577 (1968), indicates:

It is settled that the constitutional provision, Art. VI, **§** 18, does not contain an absolute disqualification, but confers a right on a litigant which he may either exercise or waive by consent. Midwest Royalties v. Simmons, 61 N.M. 399, 301 P.2d 334 (1956). See also, Gutierrez v. Middle Rio Grande Conservancy District, 34 N.M. 346, 282 P. 1, 70 A.L.R. 1261 (1929), where we said:

'* * * If a litigant chooses to avail himself of his constitutional right, then our procedure requires that some motion, objection, or other appropriate remedy be invoked calling the grounds of disqualification to the court's attention and demanding a ruling thereon.'

The two above-cited cases indicate that when a member of the judiciary falls within any of the categories enumerated in N.M. Const. art VI, **§** 18, he is subject to disqualification by any of the parties to the judicial proceeding. Therefore, if a party can demonstrate that the requisite relationship, prior participation, or interest exists, then that party has a constitutional right to disqualify the judge in question. See **Beall v. Reidy, supra.**

The right to disqualify under N.M. Const. art VI, **§** 18, does not depend upon statutory enactment, for the constitutional provision is self-executing. This conclusion is required by the case of **State ex rel. Miera v. Chavez,** 70 N.M. 289, 373 P.2d 533 (1962), where it was held that police magistrates (the same judicial officer with whom this opinion is concerned) could be disqualified on any of the grounds set forth in N.M. Const. art. VI, **§** 18, although there was no statute providing for the disqualification of such magistrates.

Therefore, we must conclude that a municipal judge may disqualified by any of the parties to a proceeding before him, if any of the grounds for disqualification, mentioned in N.M. Const. art. VI, **§** 18, are present.

The question still remains as to whether a municipal judge may be disqualified under any circumstances not specifically mentioned in N.M. Const. art. VI, **§** 18.

*{*176}* An examination of the legislative act creating the municipal magistrate courts and providing for their jurisdiction and operation [**§§** 37-1-1 through 37-1-9, N.M.S.A., 1953 Comp.], disclosed no provision for the disqualification of municipal judges (the name given to the judicial officer presiding over the municipal magistrate courts). Therefore any statutory basis for the disqualification of municipal judges must be found outside of the act creating such judgeships.

This approach was attempted at one point, and resulted in the case of **State ex rel. Miera v. Chavez, supra.** There, one of the parties attempted to disqualify a municipal

judge under the statute which provided for disqualification of justices of the peace [**§** 36-3-11, N.M.S.A., 1953 Comp., since repealed]. That statute provided that a justice of the peace could be disqualified if a party to the proceeding filed an affidavit stating that, in his belief, the justice could not preside over such proceeding with impartiality. Mr. Justice Carmody ruled that municipal judges could not be disqualified under the justice of the peace provision. He said:

The disqualification of judges is a legislative matter. State ex rel. Hannah v. Armijo, 1933, 38 N.M. 73, 28 P.2d 511. The right of disqualification for claimed bias, if it is a right, is in derogation of the common law. See Frank, Disqualification of Judges, 56 Yale L.J. 605, 609: 'The common law of disqualification, unlike the civil law, was clear and simple: a judge was disqualified for direct pecuniary interest and for nothing else.' And at 611-612: 'Judges [were] disqualified for financial interest. No other disqualifications were permitted, and bias, today the most controversial ground for disqualification, was rejected entirely.' Frank cites Coke, Co. Litt. *141a, and Blackstone, 3 Bl.Comm. *361. See, also, State ex rel. Germain v. Second Judicial Dist. Ct., 1935, 56 Nev. 331, 51 P.2d 219, 102 A.L.R. 393; in re Davis' Estate, 1891, 11 Mont. 1, 27 P. 342; Conn v. Chadwick, 1880, 17 Fla. 428; German Insurance Co. v. Landram, 1889, 88 Ky. 433, 11 S.W. 367, 592.

Statutes in derogation of the common law must be strictly construed. See, Shaw v. Railroad Co., 1879, 101 U.S. 557, 25 L. Ed. 892, wherein this principle is recognized in the statement:

'No statute is to be construed as altering the common law, further than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express.'

See also, United States v. Richmond (D. Conn. 1958), 178 F. Supp. 44, relating to strict construction of a statute having to do with disqualification of a federal judge. The courts will not add to such a statutory enactment, by judicial decision, words which were omitted by the legislature. Compare, Callwood v. Callwood (D.C. Virgin Islands, St. Thomas & St. John, 1954), 127 F. Supp. 179.

Since 1941, the legislature, in its biennial sessions, has frequently had occasion to consider the statutes with reference to justices of the peace and the statutes relating to police magistrates. At no time has the legislative body seen fit to encompass the police magistrate courts within the provisions of the liberal disqualification statute relating to justices of the peace . . .

. . . .

It is of interest to note that the only other statute in New Mexico providing for the disqualification of a judge is **§** 21-5-8, N.M.S.A., 1953, which allows a party to disqualify a district judge upon the filing of the affidavit. Thus, the legislature has seen fit to

provide by separate statutes for the disqualification of two types of judges only. There is no statutory provision allowing disqualification of any other judges in the state.

. . . .

We wish to make crystal clear that we are in no sense determining the application of the constitutional disqualification provision, but are only passing on appellant's claimed *{*177}* right to disqualify the police magistrate under the provisions of **§** 36-3-11, supra. Obviously, if the police judge is disqualified on any of the grounds set forth in art. VI, **§** 18, supra, he may not, except by consent of all the parties, preside at a trial.

The above-quoted opinion clearly indicates that a municipal judge cannot be disqualified under a **statute** providing for the disqualification of other types of judges. Since there is no statute providing specifically for the disqualification of municipal judges, we can only conclude that there can be no disqualification of such judges except by way of the constitution (N.M. Const. art. VI, **§** 18), as discussed above.

The opinion in **State ex rel. Miera v. Chavez, supra,** indicates that the legislature has not seen fit to extend statutory disqualification to municipal judges.

If it is deemed desirable that such statutory disqualification on grounds other than those mentioned in the constitution now be provided, then such provision depends on legislative action next month.

In addition to the above cited cases decided by our Supreme Court since Opinion No. 59-207, duties of the judges of this state now made obligatory by the Supreme Court should be noted. In Supreme Court Order No. 8000 Misc., adopted February 25, 1969, the American Bar Association's Canons of Judicial Ethics were adopted as Supreme Court Rule 31 [**§** 21-2-1(31), N.M.S.A., 1953 Comp. (Repl. Vol. 4)], and were made applicable to all justices, judges and magistrates of this State. These canons provide:

RULE 31. CANONS OF JUDICIAL ETHICS

1. RELATIONS OF THE JUDICIARY. The assumption of the office of judge casts upon the incumbent duties in respect to his personal conduct which concern his relation to the state and its inhabitants, the litigants before him, the principles of law, the practitioners of law in his court, and the witnesses, jurors and attendants who aid him in the administration of its functions.

2. THE PUBLIC INTEREST. Courts exist to promote justice, and thus to serve the public interest. Their administration should be speedy and careful. Every judge should at all times be alert in his rulings and in the conduct of the business of the court, so far as he can, to make it useful to litigants and to the community. He should avoid unconsciously falling into the attitude of mind that the litigants are made for the courts instead of the courts for the litigants.

3. CONSTITUTIONAL OBLIGATIONS. It is the duty of all judges to support the Constitution of the United States and the Constitution and laws of the state of New Mexico; in so doing, they should fearlessly observe and apply fundamental limitations and guarantees.

4. AVOIDANCE OF IMPROPRIETY. A judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior, not only upon the bench and in the performance of judicial duties, but also in his every day life, should be beyond reproach.

5. ESSENTIAL CONDUCT. A judge should be temperate, attentive, patient, impartial, and, since he is to administer the law and apply it to the facts, he should be studious of the principles of the law and diligent in endeavoring to ascertain the facts.

6. INDUSTRY. A judge should exhibit an industry and application commensurate with the duties imposed upon him.

7. PROMPTNESS. A judge should be prompt in the performance of his judicial duties, recognizing that the time of litigants, jurors and attorneys is of value and that habitual lack of punctuality on his part justifies dissatisfaction with *{*178}* the administration of the business of the court.

8. COURT ORGANIZATION. A judge should organize the court with a view to the prompt and convenient dispatch of its business and he should not tolerate abuses and neglect by clerks, and other assistants who are sometimes prone to presume too much upon his good natured acquiescence by reason of friendly association with him.

It is desirable too, where the judicial system permits, that he should co-operate with other judges of the same court, and in other courts, as members of a single judicial system, to promote the more satisfactory administration of justice.

9. CONSIDERATION FOR JURORS AND OTHERS. A judge should be considerate of jurors, witnesses and others in attendance upon the court.

10. COURTESY CIVILITY. A judge should be courteous to counsel, especially to those who are young and inexperienced, and also to all others appearing or concerned in the administration of justice in the court.

A judge should also require, and, so far as his power extends, enforce on the part of the clerks, court officers and counsel civility and courtesy to the court and to jurors, witnesses, litigants and others having business in the court.

11. UNPROFESSIONAL CONDUCT OF ATTORNEYS AND COUNSEL. A judge should utilize his opportunities to criticize and correct unprofessional conduct of attorneys and counsellors, brought to his attention; and, if adverse comment is not sufficient

corrective, should send the matter at once to the proper investigating and disciplinary authorities.

12. APPOINTEES OF THE JUDICIARY AND THEIR COMPENSATION. Trustees, receivers, masters, referees, guardians and other persons appointed by a judge to aid in the administration of justice should have the strictest probity and impartiality and should be selected with a view solely to their character and fitness. The power of making such appointments should not be exercised by him for personal or partisan advantage. He should not permit his appointments to be controlled by others than himself. He should also avoid nepotism and undue favoritism in his appointments.

While not hesitating to fix or approve just amounts, he should be most scrupulous in granting or approving compensation for the services or charges of such appointees to avoid excessive allowances, whether or not excepted to or complained of. He cannot rid himself of this responsibility by the consent of counsel.

13. KINSHIP OR INFLUENCE. A judge should not act in a controversy where a near relative is a party; he should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position or influence of any party or other person.

14. INDEPENDENCE. A judge should not be swayed by partisan demands, public clamor or considerations of personal popularity or notoriety, nor be apprehensive of unjust criticism.

15. INTERFERENCE ON CONDUCT OF TRIAL. A judge may properly intervene in a trial of a case to promote expedition, and prevent unnecessary waste of time, or to clear up some obscurity, but he should bear in mind that his undue interference, impatience, or participation in the examination of witnesses, or a severe attitude on his part toward witnesses, especially those who are excited or terrified by the unusual circumstances of a trial, may tend to prevent the proper presentation of the cause, or the ascertainment of the truth in respect thereto.

*{*179}* Conversation between judge and counsel in court is often necessary, but the judge should be studious to avoid controversies which are apt to obscure the merits of the dispute between the litigants and lead to its unjust disposition. In addressing counsel, litigants, or witnesses, he should avoid a controversial manner or tone.

A judge should avoid interruptions of counsel in their arguments except to clarify his mind as to their positions, and he should not be tempted to the unnecessary display of learning or a premature judgment.

16. EX PARTE APPLICATIONS. A judge should discourage ex parte hearings of applications for injunctions and receiverships where the order may work detriment to absent parties; he should act upon such ex parte applications only where the necessity for quick action is clearly shown; if this be demonstrated, then he should endeavor to

counteract the effect of the absence of opposing counsel by a scrupulous cross-examination and investigation as to the facts and the principles of law on which the application is based, granting relief only when fully satisfied that the law permits it and the emergency demands it. He should remember that an injunction is a limitation upon the freedom of action of defendants and should not be granted lightly or inadvisedly. One applying for such relief must sustain the burden of showing clearly its necessity and this burden is increased in the absence of the party whose freedom of action is sought to be restrained even though only temporarily.

17. EX PARTE COMMUNICATIONS. A judge should not permit private interviews, arguments or communications designed to influence his judicial action, where interests to be affected thereby are not represented before him, except in cases where provision is made by law for ex parte application.

While the conditions under which briefs of argument are to be received are largely matters of local rule or practice, he should not permit the contents of such briefs presented to him to be concealed from opposing counsel. Ordinarily all communications of counsel to the judge intended or calculated to influence action should be made known to opposing counsel.

18. CONTINUANCES. Delay in the administration of justice is a common cause of complaint; counsel are frequently responsible for this delay. A judge, without being arbitrary or forcing cases unreasonably or unjustly to trial when unprepared, to the detriment of parties, may well endeavor to hold counsel to a proper appreciation of their duties to the public interest, to their own clients, and to the adverse party and his counsel, so as to enforce due diligence in the dispatch of business before the court.

19. JUDICIAL OPINIONS. In disposing of controverted cases a judge should indicate the reasons for his action in an opinion, or in findings and conclusions as required by the rules, showing that he has not disregarded or overlooked serious arguments of counsel. He thus shows his full understanding of the case, avoids the suspicion of arbitrary conclusion, promotes confidence in his intellectual integrity and may contribute useful precedent to the growth of the law.

20. INFLUENCE OF DECISIONS UPON THE DEVELOPMENT OF THE LAW. A judge should be mindful that his duty is the application of general law to particular instances, that ours is a government of law and not of men, and that he violates his duty as a minister of justice under such a system if he seeks to do what he may personally consider substantial justice in a particular case and disregards the general law as he knows it to be binding on him. Such action may become a precedent unsettling accepted principles and may have detrimental consequences beyond the immediate controversy. He should administer his office with a due regard to the integrity of the system of the law *{*180}* itself, remembering that he is not a depository of arbitrary power, but a judge under the sanction of law.

21. IDIOSYNCRASIES AND INCONSISTENCIES. Justice should not be moulded by the individual idiosyncrasies or those who administer it. A judge should adopt the usual and expected method of doing justice, and not seek to be extreme or peculiar in his judgments, or spectacular or sensational in the conduct of the court. Though vested with discretion in the imposition of mild or severe sentences he should not compel persons brought before him to submit to some humiliating act or discipline of his own devising, without authority of law, because he thinks it will have a beneficial corrective influence.

In imposing sentence he should endeavor to conform to a reasonable standard of punishment and should not seek popularity or publicity either by exceptional severity or undue leniency.

22. REVIEW. In order that a litigant may secure the full benefit of the right of review accorded to him by law, a trial judge should scrupulously grant to the defeated party opportunity to present the questions arising upon the trial exactly as they arose, were presented, and decided, by full and fair bill of exceptions or otherwise; any failure in this regard on the part of the judge is peculiarly worthy of condemnation because the wrong done may be irremediable.

23. LEGISLATION. A judge has exceptional opportunity to observe the operation of statutes, especially those relating to practice, and to ascertain whether they tend to impede the just disposition of controversies; and he may well contribute to the public interest by advising, upon proper request, those having authority to remedy defects of procedure, of the result of his observation and experience.

24. INCONSISTENT OBLIGATIONS. A judge should not accept inconsistent duties; nor incur obligations, pecuniary or otherwise, which will in any way interfere or appear to interfere with his devotion to the expeditious and proper administration of his official functions.

25. BUSINESS PROMOTIONS AND SOLICITATIONS FOR CHARITY. A judge should avoid giving ground for any reasonable suspicion that he is utilizing the power or prestige of his office to persuade or coerce others to patronize or contribute, either to the success of private business ventures, or to charitable enterprises. He should, therefore, not enter into such private business, or pursue such a course of conduct, as would justify such suspicion, nor use the power of his office or the influence of his name to promote the business interests of others; he should not solicit for charities, nor should he enter into any business relation which in the normal course of events reasonably to be expected, might bring his personal interest into conflict with the impartial performance of his official duties.

26. PERSONAL INVESTMENTS AND RELATIONS. A judge should abstain from making personal investments in enterprises which are apt to be involved in litigation in the court; and he shall not participate in any matter in which he has a significant interest. It is desirable that he should, so far as reasonably possible, refrain from all relations which would normally tend to arouse the suspicion that such relations warp or

bias his judgment, or prevent his impartial attitude of mind in the administration of his judicial duties.

He should not utilize information, coming to him in a judicial capacity, for purposes of speculation; and it detracts from the public confidence in his integrity and the soundness of his judicial judgment for him at any time to become a speculative investor upon the hazard of a margin.

27. FIDUCIARY RELATIONSHIPS. A judge should not accept or continue to hold any fiduciary or other position if the holding of it would interfere or seem to interfere with proper performance of his *{*181}* judicial duties, or if the business interests of those represented require investments in enterprises that are apt to come before him judicially, or to be involved in questions of law to be determined by him.

28. PARTISAN POLITICS. While entitled to entertain his personal views of political questions, and while not required to surrender his rights or opinions as a citizen, it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes the active promoter of the interests of one political party as against another. He should avoid making political speeches, making or soliciting payment of assessments or contributions to party funds, the public endorsement of candidates for political office and participation in party conventions.

He should neither accept nor retain a place on any party committee nor act as party leader, nor engage generally in partisan activities. Where, however, it is necessary for judges to be nominated and elected as candidates of a political party, nothing herein contained shall prevent the judge from attending or speaking at political gatherings, or from making contributions to the campaign funds of the party that has nominated him and seeks his election or re-election.

29. SELF-INTEREST. A judge should abstain from performing or taking part in any judicial act in which his personal interests are involved. If he has personal litigation in the court of which he is judge, he need not resign his judgeship on that account, but he should, of course, refrain from any judicial act in such a controversy.

30. CANDIDACY FOR OFFICE. A candidate for judicial position should not make or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power; he should not announce in advance his conclusions of law on disputed issues to secure class support, and he should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination.

While holding a judicial position he should not become an active candidate either at a party primary or at a general election for any office other than a judicial office. If a judge should decide to become a candidate for any office not judicial, he should resign in order that it cannot be said that he is using the power or prestige of his judicial position to promote his own candidacy or the success of his party.

If a judge becomes a candidate for any judicial office, he should refrain from all conduct which might tend to arouse reasonable suspicion that he is using the power or prestige of his judicial position to promote his candidacy or the success of his party.

He should not permit others to do anything in behalf of his candidacy which would reasonably lead to such suspicion.

31. PRIVATE LAW PRACTICE. The practice of law by a judge or justice of any court of general jurisdiction is not permitted. In inferior courts, it is permitted, unless prohibited by law. However, in cases where a person is not prohibited from practicing law, as a judge he is in a position of great delicacy and must be scrupulously careful to avoid conduct in his practice whereby he utilizes, or seems to utilize, his judicial position to further his professional success.

He should not practice in the court in which he is a judge, even when presided over by another judge, or appear therein for himself in any controversy.

If forbidden to practice law, he should refrain from accepting any professional employment while in office.

He may properly act as arbitrator or lecture upon or instruct in law, or write upon the subject, and accept compensation therefor, if such course does not interfere with the due performance of his judicial duties, *{*182}* and is not forbidden by some positive provision of law.

32. GIFTS AND FAVORS. A judge should not accept any presents or favors from litigants, or from lawyers practicing before him or from others whose interests are likely to be submitted to him for judgment.

33. SOCIAL RELATIONS. It is not necessary to the proper performance of judicial duty that a judge should live in retirement or seclusion; it is desirable that, so far as reasonable attention to the completion of his work will permit, he continue to mingle in social intercourse, and that he should not discontinue his interest in or appearance at meetings of members of the Bar. He should, however, in pending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships, constitute an element in influencing his judicial conduct.

34. A SUMMARY OF JUDICIAL OBLIGATION. In every particular his conduct should be above reproach. He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of public clamor, regardless of public praise, and indifferent to private political or partisan influences; he should administer justice according to law, and deal with his appointments as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity.

35. CONDUCT OF COURT PROCEEDINGS. Proceedings in court should be so conducted as to reflect the importance and seriousness of the inquiry to ascertain the truth.

The oath should be administered to witnesses in a manner calculated to impress them with the importance and solemnity of their promise to adhere to the truth. Each witness should be sworn impressively at the bar or the court, and the clerk should be required to make a formal record of the administration of the oath, including the name of the witness. (Adopted February 25, 1969.)