45 REPRESENTATION OF CLIENT BY PART-TIME JUDGE *

Revised Opinion adopted June 16, 1984.
Addendum issued 1996.

Syllabus

(A) It is improper for a lawyer who is employed part-time as a judge to represent a person: (a) with respect to any matter which appears likely to come before the lawyer in his capacity as a judge or which has come before the lawyer in his capacity as a judge; (b) with respect to any matter which has derived from or was incident to a matter which has or is likely to come before the lawyer in his capacity as a judge.

(B) It is improper for a lawyer who is employed part-time as county court judge to represent a person who is accused of violating a municipal ordinance or a state criminal statute.

(C) It is not improper for a lawyer who is employed part-time as a municipal judge to represent defendants in any county or district court, or in another municipal court: (1) if the alleged crime did not take place in the municipal jurisdiction in which the lawyer sits as judge; (2) if no peace officer or other employee of the municipal jurisdiction in which the lawyer sits as judge was involved in the investigation of the matter or will appear as a witness at trial; and (3) if the criminal representation will in no way cast in doubt the legality of any aspect of the municipal ordinances which the lawyer interprets as a judge.

(D) It is improper for a lawyer whose partner, associate, employee or co-shareholder in the practice of law is employed part-time as a judge to accept or continue employment: (a) with respect to any matter which appears likely to come before the part-time judge or which has come before the part-time judge; (b) with respect to any matter which has derived from or was incident to a matter which has or is likely to come before the part-time judge. But, assuming compliance with the Code of Professional Responsibility, it is not improper for a partner, associate, employee or co-shareholder of a lawyer who is a part-time judge to represent persons accused of violating a municipal ordinance or a state criminal statute in a jurisdiction other than the one in which the part-time judge serves.

Opinion

The Colorado statutes specifically contemplate the appointment of lawyers to serve as county and municipal judges on a part-time basis. *See* C.R.S. §§ 12-5-110, 13-6-204, 13-6-208, 13-10-106. And C.R.S. § 12-5-110 specifically provides that a part-time county court judge may practice in courts higher than his own "in any case which has not been before the county court." But that conduct is declared to be legal does not always answer the ethical questions such conduct may raise. The purpose of this opinion is to answer some of the ethical issues involved when practicing lawyers serve as part-time judges.

A. Conflicts of Interest in the Dual Role of Part-time Judge and Part-time Practicing Attorney

No one can dispute that there are serious practical problems involved in finding qualified part-time judges for counties and municipalities of limited population or limited lawyer resources. But these practical problems must not be permitted to blind us to the serious ethical problems that may arise for practicing lawyers who are employed as part-time judges.

Lawyers who are part-time judges must be sensitive to potential conflicts of interest that may later force the lawyer to withdraw from representing the client and will force recusal as well. Late withdrawal by a lawyer who is a part-time judge works a substantial hardship (1) on the client, who will be forced to the expense and awkwardness of retaining new counsel in the middle of the representation, and (2) on the judicial system, because the lawyer as judge will be unable to hear cases involving the former client, forcing another judge to take over such cases. For this reason, it is improper for a lawyer to accept employment in a matter that is likely to come before the court in which the lawyer is a part-time judge. And this prohibition is to be read broadly to apply not only to controversies that are themselves likely to come

before the court in which the lawyer is a judge, but also to matters that are derived from or incident to such initial controversy and which are likely to come before the court in which the lawyer sits as a judge.

With respect to matters that have already been passed upon by the lawyer in his capacity as judge, DR 9-101(A) says specifically that "[a] lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity." Because public confidence in the judicial system is crucial to an effective system of justice, see generally EC 9-2, this prohibition on the acceptance of employment in matters passed upon by the lawyer while acting in his capacity as judge, must also be read broadly to preclude the acceptance of employment in matters that are incident to or derived from matters that came before the lawyer in his capacity as judge.

B. Representation of Criminal Defendants in Other County or District Courts by a Lawyer Who is Also Part-time County Court Judge

The American Bar Association Committee on Professional Ethics dealt in Formal Opinion 242 (1942) with a situation that is directly analogous to this question. The issue in that opinion was whether a part-time judge in a court with jurisdiction over misdemeanors and preliminary hearings could represent defendants in a court with felony jurisdiction. In concluding that it was improper for such a judge to represent criminal defendants in higher courts, the ABA Committee stated:

> It is the duty of the judge to rule on questions of law and evidence in misdemeanor cases and examinations in felony cases. That duty calls for impartial and uninfluenced judgment, regardless of the effect on those immediately involved or others who may, directly or indirectly, be affected. Discharge of that duty might be greatly interfered with if the judge, in another capacity, were permitted to hold himself out to employment by those who are to be, or who may be, brought to trial in felony cases, even though he did not conduct the examination.

In our opinion, acceptance of a judgeship with the duties of conducting misdemeanor trials and examinations in felony cases to determine whether those accused should be bound over for trial in a higher court ethically bars a judge from acting as attorney for defendants in felony trials whether they were previously examined by him or by some other county court judge. Such a practice would not only diminish public confidence in the administration of justice in both courts but would produce serious conflict between the private interests of the judge as a lawyer and of his clients, and his public duties as a judge in adjudicating important phases of criminal processes in other cases. The public and private duties within the same judicial system are incompatible. And there is a serious danger that such conduct would demean the prestige of the judicial office and would lessen public respect for the criminal justice system.

C. Representation of Criminal Defendants in County or District Court or in Other Municipal Courts by Lawyers Who Are Also Part-time Municipal Judges

ABA Informal Opinion 997 (1967) dealt with the ethical propriety of a part-time United States magistrate who wished to know if he could accept appointments to represent indigent defendants charged with a crime in state court. In that opinion the ABA Committee concluded that given the responsibility on the bar to provide counsel for indigent defendants and the fact that the lawyer would be defending those charged with violations of state law, not federal law, the lawyer could accept such appointments in the absence of special circumstances.

Among the special situations mentioned in Informal Opinion 997 that would bar accepting such appointments are: cases where the defendant is also charged with federal crimes and has appeared or may appear before the lawyer in his capacity as magistrate and cases where federal law enforcement officers who regularly appear before the lawyer in his capacity as magistrate will be important witnesses at the state trial.

We think that Informal Opinion 997 is helpful in the case of part-time municipal judges who wish to represent defendants charged with crimes in different municipal courts or in county or district courts. Unlike county or district court judges who interpret laws which apply throughout the state, municipal

judges apply ordinances which are local in application. Because municipal judges apply local law only and also because the jurisdictional limits of municipal courts are very narrow, a lawyer who is also a part-time municipal judge may ethically represent defendants in any county or district court or in municipal courts other than the one in which the lawyer sits as judge, in the absence of special circumstances: (1) if the alleged crime did not take place in the municipal jurisdiction where the lawyer sits a judge, and (2) if no peace officer or other employee of the municipal jurisdiction in which the lawyer sits as judge was involved in the investigation or will appear as a witness at trial, and (3) if the criminal representation would in no way cast in doubt the legality of any aspect of the municipal ordinance which the lawyer interprets as a judge.

These guidelines are very similar to those announced by the Ethics Committee in Opinion 46 governing part-time municipal attorneys. In that opinion the Committee decided that a part-time municipal attorney may not (1) represent clients in criminal matters which occurred within that municipality, if the attorney prosecutes cases in municipal court or advises the municipality on matters that are likely to be in issue in criminal prosecutions; (2) nor may such part-time municipal attorney represent a defendant in any criminal case in which an employee of the municipal government will appear as a witness for the prosecution; (3) nor may such part-time municipal attorney represent a party in any litigation which may require the lawyer to take a position that could adversely affect the validity of any law or ordinance governing the municipality.

Among the special circumstances that would preclude a lawyer who is also a part-time municipal judge from representing a defendant in a different municipal court or in a county or district court, would be the situation where the defendant also faces charges in the municipal court where the lawyer sits as judge or where the defendant has appeared previously to answer charges before the lawyer in his capacity as judge. These are only two examples of the sorts of special circumstances that would bar a lawyer who is also a part-time municipal judge from representing a defendant in another municipal court or in a county or district court. A lawyer in such a position must be continually careful to avoid these situations and others that may arise that could suggest to the public that the lawyer is using his position as a municipal judge to benefit his practice of law.

D. Partners, Associates, Employees, or Co-shareholders of a Lawyer Who is a Part-time Judge

Section A of this opinion concluded that the disciplinary rules of the Code of Professional Responsibility made it improper for a lawyer, who is a part-time county court judge, to accept employment in a matter that is likely to come before the court in which the lawyer is a part-time judge. And because of the hardship withdrawal works on both the client and the judicial system, the conflicts of interest provisions must be read broadly to apply not only to controversies that are themselves likely to come before the court in which the lawyer is a judge, but also to matters that are derived from or incident to such initial controversy and which are likely to come before the court in which the lawyer sits as a judge. In addition, Section A of this opinion concluded that DR 9-101(A) bars a lawyer who is a part-time judge from accepting employment in matters passed upon by the lawyer while acting in his capacity as judge, and we read that disciplinary rule broadly to include the acceptance of employment in matters that are incident to or derived from matters that came before the lawyer in his capacity as judge.

With respect to the possible vicarious disqualification of those who work with the lawyer in the practice of law, DR 5-105(D) provides:

> If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.

Because Section A of this opinion is based on DR 5-105(A) on conflicts of interest as well as DR 9-101(A) in Canon 9 which is aimed at public confidence in the judicial system, these disciplinary rules apply through DR 5-105(D) with equal force to a partner, associate, employee or co-shareholder of a lawyer who is a part-time judge. Such lawyers may not accept employment (a) with respect to matters which have or may come before the lawyer who is a part-time judge; (b) with respect to matters which

derive from or are incidental to matters which have or may come before the lawyer in his capacity as judge; or (c) with respect to matters involving persons who are parties to any matter which is or appears likely to come before the lawyer in his capacity as a judge.

The rules of conduct set out in Section B above which preclude a part-time county court judge from representing a person accused of violating a criminal statute in another county court or in a district court are based upon ethical considerations in Canon 9 relating to the appearance of impropriety and the necessity for promoting public confidence in the system of judicial administration. Since no disciplinary rule is involved, DR 5-105(D) does not automatically preclude a partner, associate, employee or co-shareholder of a judge from representing defendants charged with violating either local ordinances or state criminal statutes in jurisdictions other than the one in which the part-time judge sits.[1]

But although a lawyer who practices with a lawyer who is also a part-time judge is not automatically precluded from handling all criminal cases, such a lawyer must always be vigilant for special circumstances that would make the representation of a defendant in a criminal case improper. For example, representation of a defendant in a criminal case would be improper where the defendant had recently appeared and been sentenced in an unrelated criminal case by the part-time judge. In such a case, the danger that public confidence in the independence of the judiciary will be lessened is too great to permit subsequent representation by a lawyer who practices with the part-time judge.

1996 Addendum

On January 1, 1993, the Colorado Rules of Professional Conduct became effective. Relevant provisions of the Colorado Rules of Professional Conduct which support the conclusions of this Opinion include: Rule 1.7(a) and (b); Rule 1.9(a); Rule 1.10(a) and (b); Rule 1.12(a), (b) and (c); Rule 2.2(a)(1), (2) and (3); and Rule 8.4(e) and (f). Relevant provisions of the Colorado Code of Judicial Conduct, Canon 8, including the commentary thereto, Canon 1, Canon 2 and Canon 3, should also be examined. Canon 8 is of particular significance because in some respects it differs from Rule 1.10(c) and Rule 1.12(a) and (c). For example, Canon 8B prohibits part-time judges from taking certain cases. Rule 1.10, although similar to Canon 8C, provides for waiver of disqualification in accordance with Rule 1.10(c). The Canons, however, contain no waiver provision. A lawyer who relies solely on the Rules might obtain a waiver and proceed to take the case, but his or her partner who is the part-time judge would be held to the stricter standard of the Canons. Accordingly, where such differences exist between the Rules and the Canons, prudence dictates adherence to the strict limitations found in the Canon.

NOTE

1. Before undertaking such representation, however, lawyers might want to consider the force of C.R.S. § 12-5-118 which provides that "[a] judge shall not have a partner acting as an attorney in any court in his judicial district, county or precinct."

* On January 1, 2008, substantial amendments to the Colorado Rules of Professional Conduct became effective. The text of Colo. RPC 1.7, Conflict of Interest: Current Clients, was significantly modified. However, the ABA Ethics 2000 Commission reported that it intended no substantive changes in the rule, and that the changes were intended for clarification purposes only. The Committee agrees that the changes to Rule 1.7 are not substantive and do not alter the conflict analysis. Rather, the changes to Rule 1.7 merely alter the procedure through which informed consent must be obtained. Accordingly, the changes to Rule 1.7 do not alter the analysis or conclusions contained in this Formal Opinion.
The Subcommittee recommends appending this legend to the following Formal Opinions: 45 (Representation of client by part-time judge), 46 (Municipal attorney, representation of defendants), 58 (Water rights, representation of multiple clients), 97 (Ethics considerations where an attorney or the attorney's partner serves on the board of a public entity), 98 (Ethical Responsibilities of Lawyers who Engage in other Business), 109 (Acquiring an ownership interest in a client), 115 (Collaborative Law).