NEW YORK STATE BAR ASSOCIATION
ONE ELK STREET ALBANY NEW YORK 12207

Committee on Professional Ethics

Opinion #228 - 2/25/72 (11-72)

Topic: Private practice of criminal law by part-time judge

Modifies #57
Modifies #150
Modified by 520

Digest: Part-time judge with criminal jurisdiction cannot represent clients in criminal matters in his private practice

Code*: EC 9-2; 9-6; DR 9-101(A)
Canons of Judicial Ethics: 31

QUESTION

May a part-time judge with criminal jurisdiction represent clients in criminal matters in private practice?

OPINION

Part-time judges, including town justices, village justices, police court judges, justices of the peace, city judges and others holding similar part-time judicial offices have sought guidance as to the limits imposed on their private practice in the criminal field with increasing frequency. Accordingly, we again review the ethical considerations applicable to such part-time judicial officers.

A lawyer may in no event practice in the court in which he sits as a judge, even when presided over by another judge. Drinker, Legal Ethics 279 (1953); ABA 142 (1935); Judicial Canon 31. Similarly, a lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity DR 9-101(A).

Whether a lawyer, while occupying the office of judge, should represent a defendant in a criminal proceeding in a court other than that over which he presides presents a more difficult question. However, a careful review of the ethical considerations leads to the inescapable conclusion that the question should be answered in the negative, so that the judiciary will be held in the high esteem that the public demands and deserves. Standards of professional conduct are derived from the expressed views of the majority of the profession and ultimate acceptance of those views by the courts. The fact that the compensation provided for the part-time office may be meager does not furnish a justification for a contrary result. Limitations on a part-time judicial officer's private practice circumscribing criminal law is a small price to pay as the benefits

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derived by the public far outweigh the detriment to the individual judge.

With every benefit there is a corresponding burden. If one is not willing to undertake the burden, he should not accept the benefit of the office.

The reason for the rule prohibiting a part-time judge from practicing criminal law is set forth in ABA 242 (1942), approved in NY State 146 (1970). There it was held:

> "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 judgement, regardless of the effect on those immediately involved or others who may, directly or indirectly, be affected. Discharge of that duty might be greatly interefered 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. His private interests as a lawyer in building up his clientele, his duty as such zealously to espouse the cause of his private clients and to defend against charges of crime brought by law-enforcement agencies of which he is a part, might prevent, or even destroy, that unbiased judicial judgment which is so essential in the administration of justice.
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> "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 the judge from acting as attorney for the defendants upon such trial, whether they were examined by him or by some other 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 duties as a judge in adjudicating important phases of criminal processes in other cases. The public and private duties would be incompatible. The prestige of the judicial office would be diverted to private benefit, and the judicial office would be demeaned thereby."

One who assumes to act as a judge on one day and as an advocate the next is confronted with inherent difficulties that ought to be avoided and deprecates the employment of such a system. To permit a judge with criminal jurisdiction to practice criminal law would weaken the confidence of the public in the impartiality and objectivity of the judiciary. It could lead to the suspicion that the judge was using the prestige of his position to further his private practice. Canon 9, EC 9-2; EC 9-6.

To the extent that N.Y. State 57 (1967) and N.Y. State 150 (1970) are inconsistent with this opinion, they are overruled.