

NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 632 - 3/23/92 (18-91)

Modifies N.Y. State 252 (1972)

Topic: Disqualification of part-time judge and the judge's partners and associates

Digest: Part-time judges are prohibited from appearing before zoning board of appeals and planning board of the same municipality; disqualification of partners and associates depends on facts and circumstances.

Code: Canon 9; DR 5-101(A); 5-105(A); 5-105(B); 5-105(C); 5-105(D); 5-108; 8-101(A); 9-101(B); 9-101(C)

CJC: Canon 2; 5(f)

QUESTION

May a part-time city, town or village judge represent private clients before the zoning board of appeals and planning board of the same municipality? May the judge's partners or associates do so?

OPINION

Citing a number of its earlier opinions, this Committee in N.Y. State 252 (1972) noted that Judicial Canon 31 had been interpreted "as permitting part-time judges to engage in private practice not forbidden by law, before tribunals of which they are not a member, provided the circumstances would not give rise to any possible 'appearance of impropriety, prejudice or favoritism.'" We determined that a part-time municipal judge ethically may represent a private client before a zoning board of the same municipality in certain circumstances, but "only if it were clear that there were no conflict between his duties to the public as a judge and his duty of

undivided loyalty to his client; and provided there were a total absence of 'even the appearance of professional impropriety,'" citing Canon 9 of the Code.

The Office of Court Administration's Advisory Committee on Judicial Ethics, interpreting the Code of Judicial Conduct ("CJC"), followed and cited with approval N.Y. State 252 (1972) in Opinion 88-90 (1988). In 1990, however, the OCA Committee overruled its prior opinion and concluded in Joint Opinion 89-44; 89-60 (1990) and in Joint Opinion 90-59; 90-65 (1990) that a part-time judge may not represent private clients before either the planning board or the zoning board of appeals in the judge's jurisdiction because of the appearance of impropriety created by such representation. That Committee relied on Canon 2 of the CJC, which creates a general mandate to avoid impropriety and the appearance of impropriety. Although a municipal court has no direct jurisdiction to review determinations made by either board, the OCA Advisory Committee noted that zoning and building code violations are within the jurisdiction of municipal courts, and therefore "[a] judge who presides over zoning violation matters may be an integral part of the town's zoning enforcement scheme." OCA 89-44; 89-60. That Committee held that the judge should not represent a client before the zoning board of appeals because of the overlap with the judge's official duties. In addition, since zoning matters are involved, at least indirectly, in matters before the planning board, and since there might otherwise be a risk of "speculation, although unfounded, of political influence," the OCA Committee concluded that the judge may not practice law before the planning board.

Upon reconsideration of N.Y. State 252, we agree with the OCA Advisory Committee's conclusion that a part-time municipal judge should not practice law before either the zoning board of appeals or the planning board of the same municipality. We agree that the ethical precepts of Canon 2 of the CJC (a broad mandate to avoid the appearance of impropriety, including specific directives to promote public confidence in the integrity and impartiality of the judiciary, and to avoid using the prestige of his or her office to advance private interests) can be construed to preclude a judge's private practice of law when an appearance of impropriety would arise. See also, DR 8-101(A)(2) (a lawyer holding public office shall not use that position "to influence, or attempt to influence, a tribunal to act in favor ... of a client"). Because the municipal judge is a permanent member of the municipality's governmental structure (in contrast to the special counsel considered in N.Y. State 630 [1992]), and has jurisdiction over some zoning matters, we conclude that the part-time judge must refrain from practice before the zoning and planning boards within the same municipality.

The remaining question is whether the judge's partners and associates may represent private clients before these boards. The OCA Committee in Joint Opinion 89-44; 89-60 appears to have broadly sanctioned this practice by concluding that the judge "may permit his or her law partners or associates to represent clients and to appear before the town's zoning or planning board."

This Committee is unwilling to adopt this blanket endorsement¹ and equally unwilling to adopt a rule automatically disqualifying the judge's partners and associates from appearing before either of these boards.

Prior to the September 1, 1990 amendments to the Code, DR 5-105(D) as interpreted by this Committee on numerous occasions would have automatically extended the disqualification for any reason of one partner to all other attorneys in the same law firm.² Vicarious disqualification of partners and associates is no longer automatic in all cases. Automatic vicarious disqualification of affiliated lawyers now occurs only where a lawyer is disqualified under DR 5-101(A), DR 5-105(A), (B) or (C), DR 5-108 or DR 9-101(B). In situations falling outside these specified Disciplinary Rules, the amendment requires that particular circumstances be considered to determine whether the disqualification should extend to partners and associates.

None of the Code provisions identified in amended DR 5-105(D) applies here, where the disqualification of the judge rests on CJC Canon 2 and DR 8-101(A)(2).³ Thus, whether the partners and associates of the part-time judge may practice before the boards of the same municipality depends on the particular facts and circumstances. Clearly, the partners and associates of a part-time judge may not represent or imply that hiring the firm will result in using the influence of the judge in zoning and planning matters. See DR 9-101(C). The judge may not circumvent the force of CJC's Canon 2 by sending a partner or associate to represent the judge's clients before these boards. See DR 1-102(A)(2); DR 8-101(A)(2) and Canon 9. On the other hand, vicarious disqualification should not be imposed if the judge's partners and associates have an ongoing independent practice before these boards, the judge is screened from any involvement, and their practice is conducted without using or even appearing to use the name and influence of the judge. The partners and associates of the judge must exercise care in conducting their practice to avoid any implication that the judge has an involvement or that the judge's influence will be used.

¹ An extreme example illustrates this Committee's concern with the OCA Committee's conclusion. If the judge represents a private client in a real estate development project, but sends an associate to appear before the municipality's board using the firm's name (which prominently includes the name of the judge), all the concerns outlined by the OCA are present.

² N.Y. State 426 (1976) and N.Y. State 568 (1985) collected at least 35 opinions of the Committee where DR 5-105(D) had been so applied. Subsequently, the rule also has been applied in N.Y. State 592 (1988) and N.Y. State 615 (1991).

³ If the judge also had a "financial, business, property or personal interest" in a particular matter within the meaning of DR 1-101(A), the disqualification automatically would extend to other lawyers associated with the judge's law firm. DR 5-105(D).

CONCLUSION

For the reasons stated, the first question posed is answered in the negative. For the reasons stated and subject to the qualifications set forth above, the second question is answered in the affirmative.