New York State Bar Association
Committee on Professional Ethics

Opinion 670 - 8/3/94 (70-93)

Topic: Part-time City Court Judge and part-time assistant district attorney practicing in the same law firm

Overrules: N.Y. State 214 and 280
Modifies: N.Y. State 118

Digest: Part-time judge associated in private practice with assistant district attorney may not represent criminal defendants; The associate/assistant district attorney may not practice before the judge, but other members of District Attorney's office may appear before the judge.

Code: DR 5-101(A), 5-105 (A)-(D), 9-101(B)

QUESTIONS

1. In what courts may a part-time city judge practice law when an associate of the judge in private practice is also a part-time district attorney?

2. In what courts may a lawyer who is an assistant district attorney and who is the associate in the private practice of a part-time city judge practice law?

3. If the assistant district attorney is prohibited from practice in a particular court, are all members of the District Attorney's office also barred from practice in that court?

OPINION

An attorney is an associate in a firm, a partner of which recently has been elected a part-time judge for the City Court within County X. The associate is also a part-time assistant district attorney for County X. They inquire as to the limitations on their practice.

Limitations on practice by the part-time judge

Although private practice by a part-time judge is not prohibited, the Rules of the Chief Administrator of the Courts, 22 NYCRR §100.1 *et seq.,* set forth explicit rules regarding the judge's ability to engage simultaneously in private practice. Rule 100.5(f) states:

> [a] judge who is permitted to practice law shall, nevertheless, not practice law in the court in which he or she is a judge. . . nor shall a judge practice law in any other court in the county where his or her court is located which is presided over by a judge who is permitted to practice law.

Thus, a judge may not appear as counsel in his or her own court, or a court located in the same county presided over by another part-time judge who is permitted to practice law.

This rule ordinarily does not prohibit a judge from representing criminal clients, even in a court in the county of his or her own jurisdiction, so long as such cases are presided over by a full-time judge. In N.Y. State 520 (1980), this Committee opined that a part-time judge could represent private criminal defendants so long as the judge complied with the jurisdictional limitations of §100.5(f).[1] Thus, if the part-time judge were a solo practitioner, there would be no question that the judge could represent criminal defendants (subject to the jurisdictional limits).

The fact that the judge is associated in law practice with a part-time assistant district attorney, however, adds another dimension to the inquiry. DR 5-105(D) provides: "While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them practicing alone would be prohibited from doing so under DR 5-101(A), DR 5-105(A), (B), or (C), or DR 9-101(B) except as otherwise provided therein." Thus, the judge's ability to represent criminal defendants may be circumscribed if his associate is prohibited from doing so.

We have consistently opined that "an attorney who has prosecutorial responsibilities as an incident of part-time employment by a local governmental unit is disqualified from the private practice of criminal law in all courts of the state." N.Y. State 544 (1982); see also N.Y. State 184 (1971).[2] This prohibition is based on DR 5-105(A).

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[1] The Committee opined that the specific rule found in 22 NYCRR §100.5(f) controlled over more general ethical principles.

[2] N.Y. State 544 opines that a government attorney with authority to prosecute state offenses may not represent criminal defendants. One recent decision has declined to apply the *per se* rule of N.Y. State 544 in the context of a collateral attack on a criminal conviction where the defendant was represented by a part-time village prosecutor. The court concluded that the rule of N.Y. State 544 should not apply where the part-time prosecutor has no authority to prosecute felonies and misdemeanors, as distinguished from state law "violations." *People v. Herr*, 158 Misc.2d 306, 600 N.Y.S.2d 903 (Erie Cty. 1993), *aff'd*, 1994 N.Y. App. Div. LEXIS 4927 (4th Dep't 1994). *But see People v. Cooper*, 156 Misc.2d 483 (Erie Cty. 1990), *aff'd*, 178 A.D.2d 971, 579 N.Y.S.2d 770 (4th Dep't 1991) (applying rule enunciated in N.Y. State 544 with respect to part-time village

"[S]ince a prosecutor represents the people of the state, it is improper for him to represent individual clients charged with criminal violations." DR 5-105(C) permits a lawyer to represent multiple clients with differing interests if each consents to the representation after full disclosure of the possible effect of the representation on the exercise of the lawyer's independent professional judgment and if it is obvious that the lawyer can adequately represent the interests of each client. We have previously opined that "[b]ecause the role of the prosecutor and the defense lawyer are inherently incompatible and the prosecutor has special responsibilities to the public," that consent could not cure the conflict. N.Y. State 657 (1993). As a result, the part-time assistant district attorney/associate cannot represent criminal defendants in any court in New York State. Consequently, the part-time judge/partner is automatically disqualified from representing a criminal defendant because the judge is associated with a lawyer who may not do so. DR 5-105(D); DR 5-105(A).

Although the judge in the instant case may not represent criminal defendants (nor may any member of the firm so long as the assistant district attorney is an associate), there is no prohibition against the part-time judge being associated in practice with the part-time assistant district attorney so long as the practice is limited to civil matters. We thus overrule N.Y. State 214 (1971) and N.Y. State 280 (1972), which were issued before the effective date of 22 NYCRR §100.5. *See also* Advisory Committee on Judicial Ethics Op. 89-70 (no prohibition on part-time village justice and part-time assistant district attorney joining as partners in private practice).

Limitations on practice by the part-time assistant district attorney

As previously noted, the part-time district attorney may not represent criminal defendants in any court in the State. An additional issue is whether the part-time assistant district attorney's practice is further circumscribed because of the assistant district attorney's association in practice with the part-time City Court judge.

The restriction on the practice by the associates or partners of a judge is less severe than the restrictions on the judge. Section 100.5(f) of the Rules of the Office of Court Administration also provides: "No judge who is permitted to practice law shall permit his or her partners or associates to practice law in the court in which he or she is a judge." Thus, the only prohibition against the associates or partners of the judge practicing law is that they may not practice in the judge's court. This opinion thus modifies N.Y. State 118 (1969), which was decided before the effective date of 22 NYCRR §100.5.

Limitations on practice of other members of the District Attorney's office

The final issue is whether other members of the District Attorney's office are prohibited from appearing in the court of the part-time City Judge because the assistant

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prosecutor). The limitation in *Herr* on the scope of the disqualification described in N.Y. State 544 does not apply to the facts at issue in this opinion, which involve a part-time district attorney with authority to prosecute felonies and misdemeanors.

district attorney is so prohibited. As noted previously, DR 5-105(D) calls for automatic disqualification only in limited cases.[3] In cases where the primary disqualification does not fall within the parameters of one of the enumerated Disciplinary Rules, vicarious disqualification is dependent on the facts and circumstances of the individual case. *See* N.Y. State 638 (1992); N.Y. State 632 (1992); N.Y. State 654 (1993) (whether others are disqualified "will turn on the particular facts and circumstances, including the basis for the primary disqualification and the underlying policies and interests to be served"). Because the disqualification of the associate/assistant district attorney is based not on one of the enumerated Disciplinary Rules, but rather on 22 NYCRR §100.5(f), there is no automatic disqualification, but rather the facts and circumstances must be taken into account.

We find that the facts and circumstances of this case are such that the entire District Attorney's office need not be barred from practicing before the City Court judge with whom an assistant district attorney is associated in private practice. *See* Advisory Committee on Judicial Ethics Op. 89-70 (attorneys in district attorney's office other than judge's partner may practice in judge's court).

Generally, there must be actual prejudice, a real conflict of interest or the risk of misusing confidences.[4] The appearance of impropriety, standing alone, might not be grounds for disqualification.[5] In this situation, the disqualification of the assistant district attorney is due to personal circumstances and does not necessarily carry over to the other attorneys in the District Attorney's office. Presumably the reason the judge's partners or associates are not permitted to practice law in the court in which the judge presides is because the public may perceive that the associate may have some influence with the judge before whom the associate appears. It is unlikely that the public would lose confidence in the judicial system if another assistant district attorney prosecuted a case before a judge with whom a different assistant district attorney is associated in part-time practice. To guard against the possibility that the associate/assistant district attorney may obtain confidences or prejudice may result, it may be wise to screen the associate/assistant district attorney effectively from any knowledge of facts regarding cases that may come before the partner/judge and to avoid all contact with that attorney regarding any particular case. *See Solow v. W.R.*

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3 We note that although DR 5-105(D) refers to a "law firm," vicarious disqualification consistently has been applied to a District Attorney's office because it is the functional equivalent of a law firm. N.Y. State 492 (1978); N.Y. State 241 (1972).

4 We note the reluctance of the courts to remove the entire District Attorney's office unless there is actual prejudice or a demonstrated conflict of interest. *See, e.g., Matter of Schumer v. Holtzman,* 60 N.Y.2d 46, 55, 467 N.Y.S.2d 182, 186 (1983) ("The courts, as a general rule, should remove a public prosecutor only to protect the defendant from actual prejudice arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence"); *see also People v. Keeton*, 74 N.Y. 2d, 549 N.Y.S.2d 647, 548 N.E.2d 1298 (1989); *Matter of Morgenthau v. Crane*, 113 A.D.2d 20, 495 N.Y.S.2d 164 (1st Dept. 1985); *People v. Early,* 173 A.D.2d 884, 569 N.Y.S. 2d 756 (3d Dept. 1991).

5 *Matter of Schumer v. Holtzman*, 60 N.Y. 2d at 55, 467 N.Y.S.2d at 186; *People v. Gentile,* 153 Misc.2d 986, 986, 583 N.Y.S.2d 903, 903 (Sup. Ct. 1992).

Grace & Co., 83 N.Y.2d 303, 610 N.Y.S.2d 128, 632 N.E.2d 437 (1994) (sanctioning screening to avoid conflict).

CONCLUSION

A part-time judge who is associated in private practice with an assistant district attorney may not represent criminal defendants. The associate/assistant district attorney may not practice before the judge, but other members of the District Attorney's office may appear before the judge.
