

NEW YORK STATE BAR ASSOCIATION  
**Committee on Professional Ethics**

Opinion 701- 5/7/98 (56-97)

Topic: Part-time judge; partners and associates; co-counsel

Digest: Co-counsel of part-time judge in civil cases can only appear before another judge of same court if it is not prohibited by law and where there is no appearance of impropriety.

Code: DR 5-105(D); Canon 9

Code of  
Judicial  
Conduct: Canon 6(B)(3)

**QUESTION**

May a lawyer who is co-counsel with a part-time judge in numerous civil cases pending in courts other than where the judge sits, appear before another judge of the part-time judge's court in matters in which the part-time judge is not co-counsel?

**OPINION**

Under the prior Canons of Judicial Ethics this Committee has dealt on various occasions with the ethical constraints placed upon associates and partners of part-time judges, beginning with N.Y. State 29 (1966). In that opinion we concluded that it was improper for an associate of a part-time town court judge to appear before either judge of a town court consisting of two judges. We adhered to this determination in N.Y. State 29(a)(1967) and N.Y. State 65 (1967). In N.Y. State 65(a) (1970) this prohibition was expanded from associates and partners to lawyers sharing office space regardless of the number of members of a particular court.

In addition, we noted in N.Y. State 118 (1969) that Judiciary Law § 471 provides in pertinent part:

[A] law partner of, or a *person connected in the law business with a judge* shall not practice or act as an attorney or counselor, in a court of which the judge is, or is entitled to act as a member ... (underscoring added)

There we said that any doubt as to the relationship between counsel and the bench must be resolved in favor of the public.

We note that the Judiciary Law applies to those “connected in the law business,” and is not limited in application to “partners” or “associates.” Both the statute and Canon 6(B)(3) of the Code of Judicial Conduct, Rule 100.6(B)(3) (formerly Rule 100.5(f)) of the Rules of the Chief Administrator, 22 NYCRR §106(B)(3), also require a part-time judge to prohibit his or her partners and associates from appearing before other judges of the part-time judge’s court. If the appearance of the lawyer in the court is prohibited by Judiciary Law § 471, it is illegal, and if a matter is illegal then it is also unethical. N.Y. State 557 (1984).

The question becomes whether the on-going relationship as co-counsel in numerous cases makes the part-time judge and the lawyer either “connected in the law business” or “partners” or “associates” for purposes of the Code. As we stated in N.Y. State 609 (1990) in the context of a provision of the Code of Professional Responsibility, whether “lawyers who work on the same matters are ‘partners’, for purposes of the Code is in large part a question of law beyond the jurisdiction of this Committee. Lawyers without formal partnership arrangements have been held to the same ethical standards as partners.” The same principle is applicable to associates. Since the question of what constitutes this relationship for the purposes of the Code and Judiciary Law is so fact intensive as well as a question of law, we do not answer it here.

A separate consideration with respect to the lawyer’s conduct is DR 5-105(D), the vicarious disqualification provision of the Code of Professional Responsibility. Although since the Code’s amendment in 1990 the vicarious disqualification of partners and associates of a part-time judge is no longer automatic, vicarious disqualification may still be required if the particular circumstances of a matter warrant it. N.Y. State 632 (1992). In this connection the lawyer must assess each case on its own facts and, when reason exists, the lawyer may be disqualified. N.Y. State 654 (1993); N.Y. State 632. In considering this question, every effort must be made to avoid a public perception that the administration of justice is not fairly and impartially served. Canon 9; N.Y. State 492 (1978). *Cf.* N.Y. State 203 (1971) (applying automatic vicarious disqualification rule to bar conduct by partners and associates of part-time judge); N.Y. State 280 (1973) (same).

## **CONCLUSION**

When a part-time judge and a lawyer have an on-going relationship as co-counsel in numerous civil cases, and the relationship is that of “partner” or “associate” as those terms are used in the Code of Judicial Conduct’s Canon 6(B)(3), or they are “connected in the law business” for purposes of Judiciary Law § 471, (1) the judge is ethically prohibited from permitting the lawyer from appearing in the judge’s court, including before other judges of that court and (2) the lawyer is prohibited from so appearing.

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