



Committee on Professional Ethics

Opinion #520 - 4/23/80 (1-80)

Modifies #228

Topic: Part-time judge; private criminal practice; conflict between Rules of the Chief Administrator and ethics opinion.

Digest: Part-time judge with criminal jurisdiction may represent clients in criminal matters to the extent permitted by applicable Rules of the Chief Administrator.

Code: EC 9-2, 9-6;
DR 9-101(A).

QUESTION

May part-time judges with criminal jurisdiction represent private clients in criminal matters.

OPINION

In N.Y. State 228(1972), this Committee answered the question posed in the negative. We concluded that for part-time judges with criminal jurisdiction to engage in private criminal practice violated Canon 9 of the Code of Professional Responsibility. The perceived appearance of impropriety was that public confidence in the impartiality and objectivity of the judiciary would be weakened, and it might be suspected that judges were using the prestige of their public position to further their private practice. We felt a ban on private criminal practice was necessary in order "that the judiciary will be held in the high esteem that the public demands and deserves." In so concluding, this Committee overruled two earlier opinions, N.Y. State 57 (1967) and N.Y. State 150 (1970).

Two years after the issuance of N.Y. State 228, the Administrative Board of the Judicial Conference adopted the Rules Governing Judicial Conduct (22 NYCRR 33), now the Rules of the Chief Administrator of the Courts (the "Rules"). The authority for this enactment was Article 6, Section 28 of the State Constitution, declaring that the Administrative Board, in consultation with the Judicial Conference, was to establish standards and administrative policies for general application throughout the State.

The Rules contain specific provisions regarding the practice of law by part-time judges. In relevant part, 22 NYCRR 33.5(f) reads:

"Practice of law. A judge who is permitted to practice law shall, nevertheless, not practice law in the court in which he is a judge, whether elected or appointed, nor shall he practice law in any other court in the county in which his court is located which is presided over by a

judge who is permitted to practice law. ..."*

With the conditions for private practice so explicitly stated in 22 NYCRR 33.5(f), a reasonable reading of that section invites the conclusion that those matters not prohibited are implicitly permitted. The practice of criminal law not being among the prohibitions enumerated in 22 NYCRR 33.5(f), this section would appear to answer the question posed, and answer it in the affirmative, so long as the courts before whom part-time judges practice are presided over by full-time judges.

The present inquiry thus places before this Committee the inconsistency between the broad prohibition of N.Y. State 228 and the implicit sanction of 33.5(f).

The Rules, comprising a body of law for the guidance of judges, and the Code of Professional Responsibility, comprising a body of law for the guidance of lawyers, exist independently of each other. Neither the Rules nor the Code alone exhausts the ethical responsibilities of part-time judges. Since these two bodies of law serve a common goal, namely that of fostering public confidence in the administration of justice, they should whenever possible be viewed as supplementing each other. When there are differing rules on a specific issue which cannot be harmonized, it is obvious that both the profession and the public interest suffer, and the conflict must be resolved.

In now reaching the conclusion that the answer to the present inquiry should be taken from 22 NYCRR 33.5(f), and not N.Y. State 228, we have been principally influenced by the following three points:

First, applying a long-established principle of statutory construction, where both a general and a special enactment speak to the same concern, precedence should be given to the more specific enactment. N.Y. State 228 rests not on any specific prohibition of the Code, or long-standing precedents of this Committee, but on the sense that there would be an appearance of impropriety in permitting part-time judges to engage in criminal (although not civil) practice. The Rule, on the other hand, specifically addresses the permissible bounds of a private law practice by part-time judges. Where the specific enactment is later in time than the general, there is all the more reason to give it precedence.

Second, while also concerned with professional ethics, the focus of N.Y. State 228 was on the integrity of the judiciary, and the appearance of impartiality and objectivity of the judiciary. Administrative policy with respect to the judiciary is the particular

* The Appellate Division, Third Department, provided further in its Miscellaneous Rules, §839.5, that part-time judges could not appear in criminal proceedings in the county of their residence.

subject of the Rules and the particular concern of the Chief Administrator as successor to the Administrative Board in promulgating standards governing judicial conduct. See, N.Y. Const. Art. 6, §20(b) and (c). Thus, in matters of administrative policy relating to the judiciary, the Rules deserve special attention.

Third, this Committee has always recognized that a broad prohibition might discourage qualified lawyers from serving as part-time judges. Indeed, that factor influenced the result in N.Y. State 150. The ban imposed by N.Y. State 228 apparently had just that adverse practical effect. This Committee has been advised that the very purpose of enacting 22 NYCRR 33.5(f) in its present form was to ameliorate the practical problems created by N.Y. State 228. See, Minutes of the Administrative Board of the Judicial Conference, March 2, 1973.

In these circumstances, this Committee looks to the specific enactment of the Administrative Board for the answer to the present inquiry. Questions concerning disqualification in particular situations, or otherwise concerning the ethical responsibilities of part-time judges, are of course not encompassed by this opinion.

For the reasons stated, the question posed is answered in the affirmative, to the extent permitted by 22 NYCRR 33.5(f), and any refinements thereof adopted within each of the four departments of the Appellate Division.
