



**New York State Bar Association
Committee on Professional Ethics**

Opinion 995 (12/18/13)

Topic: Conflict of interest; lawyer and judge with employee in common

Digest: The fact that a lawyer's part-time secretary also works on personal matters of a City Court judge related to the lawyer does not preclude the lawyer's appearance before a different City Court judge, but the lawyer must take appropriate steps to protect confidential client information and may not suggest an ability to exercise improper influence.

Rules: 1.6(c); 8.4(e), 8.4(f)

FACTS

1. Inquiring attorney's son (the "related judge") is a full-time City Court judge, and there is one other full-time judge (the "unrelated judge") in the same court. The related judge was inquiring attorney's law partner before becoming a judge. The inquiry states that the related judge is permitted to hire a part-time secretary "to handle his personal matters" and he would like to hire a secretary who would also work part time in the inquiring attorney's office. In working for the related judge, the secretary "will not be working on the [unrelated] judge's files."

QUESTION

2. May the inquiring attorney appear in the City Court, before the unrelated judge only, if the inquiring attorney's part-time secretary also works for the related judge as part-time secretary for his private matters?

OPINION

3. The inquirer does not propose to appear before the related judge. *Cf.* N.Y. State 725 (1999) (opining that prosecutor may not appear before sibling Town Justice).

4. The inquirer does, however, propose to appear before the unrelated judge. We previously considered a situation in which a lawyer sought to appear before a judge although the lawyer's wife worked as the judge's confidential law assistant. N.Y. State 548 (1983). We found that the law assistant would be required to recuse herself from cases in which her husband appeared. We analyzed the underlying propriety of such appearances as an ethical issue for the judge rather than for the lawyer. Our conclusion was that the judge would not be automatically disqualified from hearing a case in which the lawyer appeared, as long as the law assistant were screened

from contact with that case, but that disqualification “may nonetheless be required or appropriate

on the facts of circumstances of a particular case.” *Id.*

5. In the current inquiry, a lawyer proposing to appear before a judge has a close familial relationship not to one of the judge’s employees, but rather to another judge of the same court. We find the considerations expressed in N.Y. State 548, though based on the Code of Judicial Conduct and the prior Code of Professional Responsibility, to be relevant to the current inquiry under the Rules of Professional Conduct (the “Rules”). A lawyer’s familial relationship with one judge does not automatically preclude the lawyer’s appearance before another judge in the same court. Additional factors in particular cases could count against the propriety of such appearance, but the only additional factor mentioned in the inquiry, which we address below, is the employment of the same secretary by the lawyer and the related judge.

6. We rely on the inquiry’s representation that the secretary will not work on any court cases assigned to the unrelated judge, and we take it that this would be true even if, for example, the unrelated judge were unavailable at a particular time and the related judge had occasion to handle one of the matters ordinarily assigned to the unrelated judge. Limiting our analysis to the ethical question posed, we do not consider other questions such as the legal propriety of the arrangements to compensate the secretary for handling the related judge’s personal matters.

7. The contemplated kinds of employment relationships are not specifically addressed by any of the Rules. Nor would more general ethical provisions and the rules of judicial disqualification, such as discussed in N.Y. State 725 and N.Y. State 548, prohibit the proposed conduct. *See, e.g.*, Rule 8.4(f) (prohibiting lawyer’s conduct in connection with a judge only when the lawyer knowingly assists the judge in conduct “that is a violation of applicable rules of judicial conduct or other law”). The inquiring lawyer is not automatically precluded from appearing before the unrelated judge on account of having an employee in common with a different judge, any more than appearing before the unrelated judge would be automatically precluded by the inquirer’s familial relationship with that different judge.

8. The inquiring lawyer must, however, be mindful of the need to protect confidential client information and must fulfill the obligation under Rule 1.6(c) to “exercise reasonable care to prevent the lawyer’s employees ... from disclosing or using confidential information of a client.” A secretary who will also be working part time in another law office should be given appropriate instructions about the importance of maintaining confidentiality while at that other office. Particular situations may call for renewed and more tailored warnings to the secretary. For example, if and when the secretary works on one of the lawyer’s cases before the unrelated judge, or even a case in some other court involving parties or issues related to a case in the City Court, the duty of reasonable care may require the lawyer to highlight the need to maintain client confidentiality at the office of the related judge. *See also* Rule 5.3(a) (degree of lawyer’s required supervision over nonlawyer depends on factors including likelihood that ethical problems might arise in course of working on the matter).

9. The inquirer must also be careful, as required by Rule 8.4(e)(1), not to state or imply an ability “to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official.” This proscription is equally applicable to the familial relationship and the shared employment relationship. For example, when negotiating a case pending in City Court,

the lawyer should not gratuitously volunteer to other parties to the negotiation that the attorney's son is a judge in that court or that the lawyer's secretary also works for that judge.

CONCLUSION

10. A lawyer's appearance before the one of two City Court judges who is not related to the lawyer is not precluded by the circumstance that the lawyer's part-time secretary is also employed part time as secretary for personal matters by the judge related to the lawyer, but the lawyer must comply with Rules 1.6(c) and 8.4(e)(1).

(18-13)