



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

Opinion 1115 (2/17/17)

Topic: Public defender; part-time judge; conflict of interest

Digest: A member of a public defender office may not represent a client in the same court where another member of the public defender office serves as a part-time judge because it would violate Rule 8.4(f), which prohibits a lawyer from causing a judge to violate his or her own ethical obligations under the Rules of Judicial Conduct not to “permit his or her partners or associates to practice law in the court in which he or she is a judge”.

Rules: 1.0(h), 1.0(p), 1.10(a), 7.2(b), 8.4(f)

FACTS

1. The inquirer lives in a locality where City Court judges serve on a part-time basis. These part-time judges may also practice law. *See* 22 N.Y.C.R.R. 100.6(B) (a part-time judge may accept private employment or public employment in a Federal, State or municipal department or agency, provided that such employment is not incompatible with judicial office and does not conflict or interfere with the proper performance of the judge’s duties). The inquirer here is a member of a public defender office. Another member of the public defender office is a part-time judge in the City Court.

QUESTION

2. May a lawyer who is a member of a public defender office appear in the court where another member of the public defender office serves as a part-time judge?

OPINION

Current Law and Court Rules

3. Although the jurisdiction of this Committee does not include interpreting laws or court rules, the question posed here is affected by law and court rules.

4. Section 471 of the Judiciary Law provides:

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

Similarly, Section 100.6(B) of the Rules of Judicial Conduct, 22 N.Y.C.R.R. §100.6(B)(3), provides:

A part-time judge:

* * *

(2) shall not practice law in the court on which the judge serves, or in any other court in the county in which his or her court is located, before a judge who is permitted to practice law, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto;

(3) shall not permit his or her partners or associates to practice law in the court in which he or she is a judge, and shall not permit the practice of law in his or her court by the law partners or associates of another judge of the same court who is permitted to practice law, but may permit the practice of law in his or her court by the partners or associates of a judge of a court in another town, village or city who is permitted to practice law
[Emphasis added]

5. Whether a lawyer is “connected in law business” with a judge or is an “associate” of a judge within the meaning of Section 471 of the Judiciary Law or Section 100.6(B) of the Rules of Judicial Conduct are legal questions beyond the jurisdiction of this Committee.

6. Under the New York Rules of Professional Conduct (the “Rules”), attorneys who are members of the same public defender office usually are considered to be part of the same firm. Rule 1.0(h) defines the terms “firm” or “law firm” to include “lawyers employed in a qualified legal assistance organization.” Rule 1.0(p) defines a “qualified legal assistance organization” as an “office or organization of one of the four types listed in Rule 7.2(b)(1)-(4) that meets all of the requirements thereof.” Finally, Rule 7.2(b)(1) lists the following types of qualified legal assistance organizations:

a legal aid office or *public defender office*: (i) operated or sponsored by a duly accredited law school; (ii) operated or sponsored by a bona fide, non-profit community organization; (iii) operated or sponsored by a governmental agency; or (iv) operated, sponsored, or approved by a bar association. [Emphasis added.]

7. Comment [4] to Rule 1.0 indicates that the structure of a legal services organization may determine whether the entire organization, or rather some components of an organization, constitutes a “firm” for purposes of the Rules. The precise scope of a “firm” within a legal services organization is a factual question that is beyond the jurisdiction of our Committee. *See* N.Y. State 1104 (2016); N.Y. State 1036 (2014); N.Y. State 862 (2011).

8. Rule 1.10(a) provides as follows: “While lawyers are *associated* in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein.” (Emphasis added.) The lawyers in a public defender office are considered “associated” even if assistant public defenders work on a part-time basis. *See* N.Y. State 862 (2011) (the phrase “associated” in Rule 1.10(a) “includes part-time attorneys as well as full-time attorneys”). This Committee has

previously concluded that members of a county public defender office may be considered to be “associated” in the same firm for imputation purposes under Rule 1.10(a), even if the lawyers in the public defender office work independently. Compare N.Y. State 975 (2013) (involving a county with a single public defender having a central role in providing legal services under County Law §701 and concluding that all assistant public defenders should be considered to be associated in the office) with N.Y. State 914 (2012) (a panel of lawyers established to provide legal assistance to indigent clients when the Legal Aid Society has a conflict and whose members did not have a common supervisor or share files or confidential information with Legal Aid Society Lawyers was not part of the same “firm” as the Legal Aid Society). The remainder of this opinion assumes that the inquiring public defender would be considered to be associated with the part-time judge because they are both members of the same public defender office.

Prior Opinions of this Committee Regarding Associates of Part-Time Judges

9. We have issued a long line of opinions dealing with the ethical constraints placed upon associates of part-time judges. *See, e.g.* N.Y. State 701 (1998) (lawyer who is co-counsel with a part-time judge in a civil case may not appear before another judge on the part-time judge’s court because the public might perceive that the administration of justice is not fairly and impartially served), N.Y. State 670 (discussing practice restrictions on a part-time City Court judge and a part-time DA who are associated with each other in private practice); N.Y. State 118 (1970) (under the Canons of Judicial Ethics, a village police judge may not sit on criminal matters if his partner is an assistant district attorney); N.Y. State 65 (1967) (Judicial Canons prohibit partners of an acting village judge from appearing before a regular judge of the court); N.Y. State 29a (1967) (even if it does not violate the law, an associate in the law firm of a part time judge may not ethically appear before the other judges on that court, since it is not conducive to building public confidence in the courts). These opinions were based on various sources, including §471 of the Judiciary Law, the Code of Judicial Conduct, and the prior Canons of Judicial Ethics, as well as Canon 9 of the Code of Professional Responsibility and several Ethical Considerations in the Code of Professional Responsibility prohibiting the appearance of impropriety or the appearance of undermining the impartiality of a tribunal. N.Y. State 701 also took the position that, if an appearance before a part-time judge was illegal under §471 of the Judiciary Law, it was also unethical. That view was based on former DR 1-102(A)(4), which considered it misconduct for a lawyer to engage in “illegal” conduct.

10. Some of these bases no longer apply to opinions issued by this Committee. The Canons of Judicial Ethics were replaced by the Code of Judicial Conduct, and, later, the Rules of Judicial Conduct of the Chief Administrator of the Courts. In any case, as noted above, interpreting statutes and court rules is beyond our jurisdiction.

Application of Rule 8.4(f)

11. Rule 8.4(f) provides that a “lawyer or law firm shall not . . . knowingly assist a judge or judicial officer in conduct that is in violation of applicable rules of judicial conduct or other law.” Under this provision, a lawyer may not knowingly undertake a representation when doing so would cause a judge to violate his or her own ethical obligations under the Rules of Judicial Conduct (such as the obligation in §100.6(B)(3) not to “permit his or her partners or associates to practice law in the court in which he or she is a judge”).

12. For this reason, if the associated part-time City Court judge does not take steps to prevent other lawyers who are members of the same public defender office from practicing before the City Court, then the other public defenders must on their own initiative decline to make such appearances or withdraw.

13. Opinions in other jurisdictions have reached similar conclusions based upon the interplay between a Rule of Judicial Conduct and a lawyer's duty under Rule 8.4(f). *See* Phila. Op. 91-33 (1991) (holding that inquiring attorney could not appear before a member of the Tax Review Board where a retired member of the firm was a member of the Tax Review Board, because the Code of Judicial Conduct would require the Tax Review Board member to recuse himself -- and if he failed to do so, then the inquirer would be in violation of Rule 8.4(f) if the inquiring lawyer participated in the hearing because it would be assisting a judge in conduct in violation of the applicable Rules of Judicial Conduct); S.C. Op. 94-05 (1994) (considering whether a lawyer could hire a probate judge as a part-time attorney and noting that, while the question presented might be directed more appropriately to the Advisory Committee on Standards of Judicial Conduct, because the inquirer was the lawyer who would hire the judge and because the applicable South Carolina ethics rule prohibited the lawyer from knowingly assisting a judge in conduct that violated applicable rules of judicial conduct or other law, the inquiry also fell within the purview of the Ethics Committee.)

CONCLUSION

14. A member of the public defender's office may not represent a client in the court where another public defender is a part-time judge, because to do so would violate the public defender's duties under Rule 8.4(f).

(39-16)