New York State Bar Association
Committee on Professional Ethics

Opinion 672 - 1/5/95 (29-94)

Topic: Part-time confidential law clerk and part-time assistant district attorney as partners in private practice

Digest: Partners may hold positions as an assistant district attorney and confidential law clerk to a County Court judge provided that the confidential clerk may not appear before any judge of the County Court or practice criminal law and the assistant district attorney may not appear before the County Court judge employing the confidential clerk, although other members of the District Attorney's staff are not so restricted.

Code: DR 5-105(D).

Code of Judicial Conduct: Canons 2, 3, 3(B)(2).

QUESTIONS

(1) May two attorneys employed as a part-time Assistant District Attorney and a part-time confidential law clerk to a County Clerk judge, respectively, be partners in private practice?

(2) If so, what limitations does such an arrangement place on the public or private practice of either attorney and upon the District Attorney's office?

OPINION

Attorney A and Attorney B are partners in a law firm in County X. Attorney A is also a part-time District Attorney in County X, prosecuting actions mainly in Town Justice Court and the City Court for City Y. Occasionally, Attorney A's duties as

assistant district attorney include an appearance in the County Court for County X. Attorney B is considering an appointment as a confidential law clerk for a County Court judge in County X.

The extent to which confidential law clerks are permitted to maintain a private law practice is, to some extent, governed by the rules of the Judicial Departments.

The First Department has adopted a rule prohibiting such practice.[1] 22 NYCRR §603.21. Thus, as a matter of law in the First Department, confidential law clerks cannot maintain a private practice. If an act is illegal, it is also unethical. N.Y. State 328 (1973).

The Fourth Department has a rule prohibiting practice in Supreme Court or County Court by a confidential clerk to a Supreme Court justice or a law secretary to an Appellate Division justice.[2] This rule, however, does not apply to a confidential clerk to a County Court judge nor to any confidential clerk appearing in City Court or Town Justice Court. The Second and Third Departments have no rule on the subject.

The Code of Judicial Conduct (CJC) provides that a "judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him." Canon 3(B)(2). Canon 3 makes it clear that court personnel with a close working relationship with a judge should be required by the judge to abide by the same restrictions as the judge. Canon 2 requires that a judge avoid impropriety and the appearance of impropriety. It follows that a confidential law

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1 This provision states:

> An attorney who is employed as a public officer or employee in any court in this judicial department shall not maintain an office for the private practice of law, alone or with others, hold himself out to be in the private practice of law, or engage in the private practice of law.

The First Department rules also state that an attorney "shall not engage in any other practice of law which is incompatible with or would reflect adversely upon the performance of his duties." 22 NYCRR § 603.21(c). An attorney may obtain permission to appear before Surrogate's Court and the Supreme Court in limited situations. 22 NYCRR § 603.21(b).

2 The Fourth Department rule provides:

> An attorney who is employed part-time . . . as a confidential clerk or deputy confidential clerk to a Supreme Court justice or law secretary to an Appellate Division justice shall not appear as attorney or counsel in any action or proceeding pending in the Supreme Court or a County Court, nor shall he subscribe his name to papers or documents pertaining thereto. The attorney may engage in any other practice of law which is compatible with and would not reflect adversely upon the performance of his duties.
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> 22 NYCRR 1022.15(b).

clerk must avoid all appearances of impropriety as well. A part-time judge is prohibited from practicing in his own court or in any court located in the same county which is presided over by a part-time judge. 22 NYCRR 100.5(f); *see* N.Y State 670 (1994). Because it would be improper for a part-time judge to practice in his or her own court, it is also improper for a part-time confidential law clerk to do so.

This Committee has previously opined that a part-time confidential law assistant to a County Court judge could practice law in a federal court in the same county. N.Y. State 357 (1974). This Committee sanctioned the part-time practice of confidential law clerks in courts other than those by which the confidential law clerk was employed. This Committee also has opined that a confidential law clerk to a Supreme Court justice could not practice before the Supreme Court, whether a rule prohibited such practice or not. N.Y. State 361 (1974). Although these opinions were issued at a time when the various Judicial Department rules were somewhat different than the current rules, we see no reason to alter our view. As we noted in N.Y. State 361, "[t]he mere act of a confidential clerk in holding himself out as engaged in the general practice of law may carry an intimation that he is in a position to influence the decision of the court and that he is using his relationship with the judge for his private advantage . . . all to the discredit of the court and the disparagement of our system of justice in the eyes of the public." Permitting a part-time confidential clerk to practice before *other* courts limits any intimation that he is currying favor and influence because of the clerk's position in the judicial system.

Thus, where a confidential law clerk is permitted to practice part-time, the attorney may practice law in the same county to the extent permitted by Judicial Department rules, but may not practice before the court by which he or she is employed. Other than in the First Department, Attorney B could not practice before the County Court of County X, but may practice in other courts in County X.

The extent to which the practice of partners and associates of a part-time confidential law clerk is limited is covered only in the Fourth Department rule which provides: No partner or associate of the attorney employed as a part-time confidential clerk or deputy confidential clerk or law secretary shall practice law before the justice by whom the attorney is employed." 22 NYCRR 1022.15(b). Thus, in the Fourth Department, law partners of confidential clerks may appear in all courts and before all judges *except* the one employing the law clerk.

In the Second and Third Department, where a confidential law clerk may practice part-time, there is no rule limiting the partner's practice. DR 5-105(D), however states:

> While lawyers are associated in a law firm, none of them shall 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), DR 5-108, or DR 9-101(B) except as otherwise provided therein.

Thus, there is no automatic disqualification under DR 5-105(D) because the confidential clerk is disqualified by virtue of the CJC and not by one of the enumerated provisions. Whether there nevertheless would be a disqualification of Attorney B's partner A depends on an analysis of the "particular facts and circumstances, including the basis for primary disqualification and the underlying policies and interests to be served." N.Y. State 638 (1992); N.Y. State 632 (1992); N.Y. State 670 (1993).

As detailed in N.Y. State 361 (1974), the reason that the partners and associates of confidential law clerks are not permitted to practice law in the court in which the confidential law clerk is employed is because the public may perceive that the law clerk may have some influence with the judge before whom the confidential law clerk appears. While the public may perceive that the partner of the law clerk may have some influence with the judge employing his partner, it is unlikely that the partner would have influence with other judges in the County Court. Thus, we would follow the rule in the Fourth Department and permit the partner to appear before any judge in the County Court *other than* the judge by whom his partner is employed as a confidential law clerk.

Because the District Attorney's office is the functional equivalent of a law firm, N.Y. State 492 (1978); N.Y. State 241 (1972), the assistant district attorney is treated as if he were a partner in another law firm. Thus, the restrictions of DR 5-105(D) are equally applicable to the District Attorney's office. Once again, there is no automatic disqualification because Attorney A is not disqualified from practice before the County Judge employing his partner due to one of the enumerated provisions.

As a general rule, disqualification of the entire District Attorney's office is warranted only upon a finding of actual prejudice, a real conflict of interest or the risk of misusing confidences. N.Y. State 670. In situations where the disqualification of a part-time assistant district attorney is due to his or her personal circumstances and relationship with another attorney, this disqualification does not necessarily carry over to the other attorneys in the District Attorney's office. In this circumstance, the possibility that the public would lose confidence in the judicial system if another assistant district attorney prosecuted a case before the County Court judge who employs a confidential clerk is a partner of another assistant district attorney is too attenuated. To guard against the possibility that Attorney A might obtain confidences or that actual prejudice may result, the District Attorney's office should screen Attorney A from any knowledge of facts regarding cases that may come before Attorney B in his capacity as confidential law clerk and Attorney A should have no contact with regard to a case handled by an assistant district attorney handling a case who will appear before the Judge employing Attorney B. N.Y. State 670; *see Solow v. W.R. Grace & Co.,* 83 N.Y.2d 303, 610 N.Y.S.2d 128 (1994) (sanctioning screening to avoid conflict).

Because only another assistant district attorney and not Attorney B's partner may appear before the County Judge employing Attorney B, there is no need for Attorney B

to recuse or disqualify himself or herself. In the event, however, that there is an appeal from a Town Justice Court or City Court of a case prosecuted by Attorney A to County Court, which is presided over by the County Court Judge employing Attorney B, Attorney B should be screened and isolated from the matter and the parties should be advised to the relationship between Attorney B and Attorney A, even if the appeal is handled by an assistant district attorney other than Attorney A, so as to avoid the CJC Canon 2 prohibition of the appearance of impropriety.

Finally, Attorney A, as a part-time assistant district attorney, is prohibited from practicing criminal law anywhere in the State. N.Y. State 544 (1982). This prohibition applies as well to Attorney's partners and associates in private practice. DR 5-105(D); N.Y. State 654 (1994). Thus, Attorney B may not undertake criminal defense work.

CONCLUSION

A part-time confidential law clerk to a County Court Judge and a part-time assistant district attorney in the same county may be partners in private practice. The confidential law clerk may not engage in private practice before any judge of the County Court or practice criminal law. The assistant district attorney may not appear before the County Court judge employing Attorney B, although other members of the District Attorney's office are not so restricted, provided the safeguards set forth herein are followed.
