

ETHICS OPINION

RO-2008-02

Part-time Judges; Part-time Assistant District Attorneys and Imputed Disqualification

QUESTIONS:

1. May a partner or associate of a part-time municipal court judge represent clients in municipal court provided that the matter is unrelated to any matter presided over by the partner as a part-time municipal court judge?
2. May a partner or associate of a part-time assistant district attorney represent criminal clients within or outside the jurisdiction of the part-time assistant district attorney?

ANSWERS:

1. Pursuant to Rule 1.10, Alabama Rules of Professional Conduct, a partner or associate of a part-time municipal court judge may not represent a client in municipal court regardless of whether their law partner has or may have had any involvement as a part-time municipal court judge.
2. A partner or associate of a part-time assistant district attorney may only represent criminal clients in matters in courts not within the jurisdiction of their law partner and that are unrelated to any matter handled by the part-time assistant district attorney.

DISCUSSION:

The use of part-time municipal court judges and part-time assistant district attorneys is prevalent throughout Alabama, especially in more rural areas of the state. Often times, the attorneys that serve in these roles are members of firms in which the firm's other members continue to represent criminal clients. Clearly, attorneys that serve as either a part-time municipal court judge or part-time assistant district attorney are ethically prohibited from representing criminal clients within the jurisdiction in which they serve. In the case of a part-time assistant district attorney, the attorney is also prohibited by

statute from representing criminal clients anywhere in the state. The more difficult issue is how other members of the firm are affected by a law partner or associate's service as a part-time municipal court judge or part-time assistant district attorney.

Specifically, the issue before the Disciplinary Commission is whether the disqualification of the part-time judge or part-time assistant district attorney is imputed to the remaining members of the firm pursuant to Rule 1.10(a). Rule 1.10(a), of the Alabama Rules of Professional Conduct, provides as follows:

RULE 1.10 IMPUTED DISQUALIFICATION: GENERAL RULE

(a) 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 Rules 1.7, 1.8(c), 1.9 or 2.2.

In RO-1999-03, the Disciplinary Commission held that law partners may represent criminal defendants in municipal court, even though a law partner may serve as a substitute municipal court judge, provided that the matters wherein the law partners represent clients are completely unrelated to those wherein the law partner presided as a substitute judge. In reaching that conclusion, the Disciplinary Commission determined that the conflict of interest that would prevent an attorney from representing a client in a court wherein that attorney serves as a judge is a personal rather than general disqualification. As such, the conflict of interest is not imputed to other members of the attorney's firm under Rule 1.10.

However, in determining that such disqualification was personal rather than general, the Disciplinary Commission focused on the frequency of the law partner acting as a substitute municipal court judge. Specifically, the Disciplinary Commission noted that:

[T]he frequency of a lawyer as a part-time judge or administrative hearing officer would dictate whether that lawyer or his law partners could represent clients before those same agencies or boards.

The Commission would reference Rule 8.4 which concludes that it is professional misconduct for a lawyer to state or imply an

ability to influence improperly a government agency or official. Pursuant to this provision, the Commission obviously considers the frequency of appearance as administrative law judge or hearing officer a primary factor in determining whether the law partners of such a hearing officer or substitute judge could represent clients before the same agency or tribunal.

Absent such frequency, the Commission is of the opinion that your infrequent service as substitute municipal court judge does not prohibit your remaining law partners from handling cases for clients appearing in this same court provided that you are in no way involved in or connected with said proceedings.

In the instant matter, a part-time judge serves on a regular and continuous basis as opposed to a rare or infrequent basis as previously considered in RO-1999-03. Therefore, the issue becomes whether regular and continuous service as a part-time judge by a law partner would constitute a mere personal disqualification or would it create a general disqualification that would be subsequently imputed to other members of the part-time judge's law firm.

The Comment to Rule 1.10(a), Ala. R. Prof. C., states in pertinent part that:

The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated.

Where an attorney only serves as a municipal court judge on a rare and infrequent basis, loyalty to the criminal client would not be a concern. Such would not be the case where an attorney serves as a judge on a regular basis. In the case at hand, as the part-time municipal court judge, an attorney would have a duty to uphold the laws and ordinances of that municipality. This duty would not be an infrequent one as discussed in RO-1999-03, but rather a continuous one. Such a duty would limit the attorney's ability to attack such laws and ordinances when representing a client in that court. Moreover, while representing a client, an attorney may be required to attack the credibility of a police officer's

testimony one week, and be required the next week to consider that same officer's testimony in a separate matter as a non-biased jurist. Such conflicting roles and responsibilities create a conflict of interest for the attorney under Rule 1.7(b).

Rule 1.7(b), Ala. R. Prof. C., provides as follows:

RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

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(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

The Disciplinary Commission believes that an attorney serving as a part-time municipal court judge would be prevented from representing clients in that same court under Rule 1.7(b), Ala. R. Prof. C. Pursuant to Rule 1.10(a), Ala. R. Prof. C., disqualification would be imputed to the judge's law partners and/or associates by virtue of the Rule 1.7 conflict of interest. As such, a partner or associate of a part-time municipal court judge may not represent a client in municipal court regardless of whether their law partner has or may have had any involvement as a part-time municipal court judge.

Likewise, a partner or associate of a part-time assistant district attorney would similarly be precluded both ethically and by statute¹ from representing

¹ Alabama Code §12-17-196 provides, "Any law partner or partners of any district attorney or assistant district attorney of this state who defend criminal

clients in any court in which the part-time assistant district attorney would have jurisdiction. Alabama Code §12-17-195 provides that, “Any assistant district attorney who acts as attorney for, represents or defends any defendant charged with a criminal offense of any kind or character in any court, state, municipal or federal, in this state, shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than \$100.00 nor more than \$1,000.00.” As such, a part-time district attorney is prohibited by statute from representing any criminal client in any court in the state. The issue then is whether the other members of the firm would also be precluded from representing criminal clients in other jurisdictions.

It appears to the Disciplinary Commission that the majority of states that have addressed this issue have determined that the disqualification is imputed to other members of the attorney’s firm. The reasoning most often expressed is that a part-time assistant district attorney’s client is the state and that any representation of a client adverse to the state by a part-time assistant district attorney would constitute a conflict of interest under Rule 1.7(a), Ala. R. Prof. C., which provides as follows:

RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

Because the part-time assistant district attorney has a conflict of interest pursuant to Rule 1.7(a), it is necessarily imputed to his law partners under Rule 1.10(a). While such logic is sound, the Disciplinary Commission believes that such an application of Rule 1.7(a) and Rule 1.10(a) is unnecessarily strict and would not serve the true purpose of Rules 1.7(a) and 1.10(a), which is the preservation of client loyalty and confidences.

cases of any character, kind or description in any court in this state in which said district attorney or assistant district attorney is the prosecuting officer shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than \$500.00.”

The State of Alabama is not a single individual but rather a large and complex entity comprised of many different agencies and departments. In RO-89-115, the Disciplinary Commission previously held that a lawyer or law firm may represent an agency of state government in one matter, while simultaneously representing a client adverse to a different state agency in an unrelated matter. To treat the state as a single individual for the purpose of determining conflicts of interests, would be, in the opinion of the Disciplinary Commission, inappropriate and an overbroad application of Rule 1.10(a). In the instant matter, the duty of client loyalty and preservation of client confidences are not imperiled by the representation of the state by one member of the firm and the representation of a criminal client in an unrelated matter in a wholly separate jurisdiction by another member of the firm.

Additionally, the Annotation to the Annotated Model Rules of Professional Conduct, 6th Edition, notes that:

Amendments made to Model Rule 1.10 in 2000 eliminate the imputation of most “personal-interests” conflicts. Pursuant to these amendments, a disqualification attributable to the lawyer’s own interests (rather than those of, for example, other clients or former clients) will not be imputed absent a significant threat to the representation.

* * * *

According to Comment [3], this exception recognizes that conflicts should not be imputed “where neither questions of client loyalty nor protection of confidential information are presented . . .”

As such, the Disciplinary Commission finds that the disqualification of a part-time assistant district attorney from representing criminal clients is not imputed to that attorney’s law partners as long as the partners are representing criminal clients in matters in courts not within the jurisdiction of their law partner and that are unrelated to any matter handled by that part-time assistant district attorney.

JWM/s

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