

ADVISORY ETHICS OPINION 92-02

SYNOPSIS:

The lawyer who performs statutory duties as an assistant judge: (1) should not practice law in the court, hearing rooms and chambers where the lawyer sits as judge; (2) should not practice law in a court where the non-judicial duties and responsibilities make that lawyer a functioning member of the court and affects that lawyer's independent judgment and/or creates an appearance of impropriety. In addition, when that lawyer is disqualified from providing representation to a particular client or in a particular court, all lawyers affiliated with that lawyer are disqualified to the same extent.

ETHICAL RESPONSIBILITIES:

Resolution of these issues require examination of the interaction between the Code of Judicial Conduct adopted by Administrative Order 10, V.S.A. (Supp. 1991) and the Code of Professional Responsibility adopted by Administrative Order 9, V.S.A. §21 (Supp. 1991). The two codes impose inconsistent obligations for the lawyer who attempts to act as judge concurrently with practicing law. The ethical obligations at issue for the lawyer include: loyalty to the client under DR 5-101 (A), DR 5-105 (A), DR 5-105 (D), EC 5-1, EC 5-2, EC 5-21; zealous representation under DR 7-101 (A) (1), EC 7-2, EC 7-3; and the avoidance of impropriety under DR 8-101 (A) (2), EC 9-2, EC 9-8.

The Code of Professional Responsibility

DR 4-101 Preservation of Confidences and Secrets of a Client

- (A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested to be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
- (B) Except when permitted under DR 4-101 (C), a lawyer shall not knowingly:
 - (1) Reveal a confidence or secret of his client.
 - (2) Use a confidence or secret of his client to the disadvantage of the client.
 - (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair his Independent Professional Judgment

- (A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

EC 5-1 A Lawyer Should Exercise Independent Professional Judgment On Behalf of a Client

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties . . .

EC 5-2 Interests of a Lawyer That May Affect His Judgment

A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client. After accepting employment, a lawyer should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client.

EC 5-21

The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer.

DR 5-105

- (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected if it would be likely to involve him in representing differing interests, except permitted under DR 5-105 (C)

- (C) [multiple client representation with disclosure]

- (D) If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.

DR 7-101 Representing a Client Zealously

(A) A lawyer shall not intentionally:

- (1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules...

EC 7-2

The bounds of the law in a given case are often difficult to ascertain. The language of legislative enactments and judicial opinions may be uncertain as applied to varying factual situations. The limits and specific meaning of apparently relevant law may be made doubtful by changing or developing constitutional interpretations, inadequately expressed statutes or judicial opinions, and changing public and judicial attitudes. Certainty of law ranges from well- settled rules through areas of conflicting authority to areas without precedent.

EC 7-3

Where the bounds of law are uncertain, the action of a lawyer may depend on whether he is serving as advocate or adviser . . . While serving as advocate, a lawyer should resolve in favor of his client doubts as to bounds of the law

DR 8-101 Action as a Public Official

(A) A lawyer who holds public office shall not

- ...
(2) Use his public opinion to influence, or attempt to influence, a tribunal to act in favor of himself or of a client.
...

EC 9-2

Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laymen to be unethical. . . . When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.

EC 9-8

Every lawyer owes a solemn duty to uphold the integrity and honor of the profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility; to conduct himself or herself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

Conflicts Between Judicial Obligations and Lawyer Responsibilities

As an assistant judge in family court there are limitations on a law practice. As a member of the judicial system the assistant judge must comply with the Code of Judicial Conduct. Canon 8.¹ Since an assistant judge functions full or part-time in that role for an elected term, but is paid less than full-time for judicial duties, that judge's judicial conduct is governed by the Code.

It is obvious that a lawyer may not participate in any court proceeding where the lawyer sits as assistant judge. The Judicial Code is clear that a lawyer should not practice law in the same chambers, hearing rooms or court where the lawyer sits in a judicial capacity as a part-time judge.² The Judicial Canons, the Lawyer ethical considerations and Disciplinary Rules all condemn the appearance of impropriety and prohibit a law practice in the same court where a lawyer sits as a part- time judge.

Where the duties of the office make an assistant judge a functioning member of the superior court, it creates an appearance of impropriety for the assistant judge to practice law in that court. A judge should avoid all appearance of impropriety.³ Canon 2.

¹ A.O. 10 V.S.A. Canon 8 (Supp. 1991)

Canon 8. Compliance with the Code of Judicial Conduct

Anyone, whether or not a lawyer, who is an officer of a judicial system performing judicial functions, including an officer such as a master, commissioner, or magistrate, is a judge for the purpose of this Code. All judges should comply with this Code except as provided below.

(A) *Part-time Judge.* A part-time judge who serves on a continuing or periodic basis, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge. A part-time judge:

- ...
(2) should not practice law in the court or in the chamber and hearing rooms provided pursuant to 24 V.S.A. §71 in which the judge serves or in any court subject to the appellate jurisdiction of the court on which to judge serves, or act as a lawyer in a proceeding related thereto.

² Canon 8A(2), ND: Opinions 13 n.9, MN: Opinions 3 n.8, Nat'l Rpt. on Legal Ethics (1985), ABA Formal Opinion 142, ABA Formal Opinion 242.

³ A.O. 10 V.S.A. Canon 2 (1986)

Canon 2. A judge should avoid impropriety and the appearance of impropriety in all his activities.

Moreover, lawyers are admonished to avoid the appearance of impropriety as well.⁴ Furthermore, a lawyer who holds a public position cannot use that position to influence the tribunal in a client's behalf.⁵ For these reasons, it would be improper for a lawyer to practice in the superior court when sitting as assistant judge in family court if any duty connected with the judicial position overlaps the two courts.

The assistant judge as non-judicial duties and responsibilities outside of the courtroom. Where these duties are supervisory, such as preparing county budgets, overseeing the Sheriff's Department, managing county property and other managerial tasks within the court system, there is an implicit influence over the court. This supervisory role creates the appearance that a lawyer can take advantage of a public position to influence the court on the client's behalf. Therefore, even in a court proceeding where the lawyer does not sit as assistant judge, the non-judicial duties that overlap from one court to another should disqualify that lawyer from practicing law in a court where he or she has influence as assistant judge.

The Judicial duties of a judge take precedence over all of his or her other activities. Canon 3.⁶ This restriction creates the potential of conflict of interest for the lawyer who is an assistant judge. The Code of Professional Responsibility is clear that the lawyer has a duty of loyalty and zealous representation to the client DR 7-101 (A) (1), EC7-2, EC7-3, EC5-1, EC5-2, EC5-21. The primacy of the Judicial Code's overriding concern with the impartiality of the judiciary might inhibit the lawyer's ethical responsibility to be an advocate were the lawyer to appear in the same county court in which the lawyer performs any judicial functions as assistant judge. The two Codes impose inconsistent obligations between loyalty to the court and to one's client.

Where a lawyer has a strong personal interest in maintaining an amicable relationship with a superior court judge with whom he or she works in a judicial capacity, that lawyer's independent judgment may be affected. If the obligations of the office of assistant judge could cause the lawyer to be less protective of a client's interests, then the lawyer should not attempt to represent that client.⁷ Moreover, the lawyer has an obligation to seek reasonable legal objectives.⁸ In contrast to the requirement of judicial impartiality, the lawyer has an ethical obligation as an advocate to resolve questions as to the bounds of the law in favor of the client.⁹ A lawyer therefore must be free to argue all points of law and to challenge judicial decisions which affect the client's interests. This would be difficult in a situation where the judge whose decision must be challenged sits in the county court where the lawyer has been elected as an assistant judge. Thus, where the lawyer's judgment and zealous advocacy on behalf of a client could be affected adversely in such a manner, the lawyer should decline to represent the client in that court.

In light of the foregoing discussion, where the lawyer/assistant judge performs judicial functions exclusively in family court, there are several factors which affect the determination of whether that same person may practice law in superior court. These factors include:

- (1) Whether independent judgment may be affected where the judges who sit in family court also sit in superior court;
- (2) Whether independent judgment may be affected where the attorneys who appear before the lawyer/assistant judge in family court also appear in superior court as opposing counsel or co-counsel;
- (3) Whether non-judicial duties such as the management of county property, preparing court budgets and overseeing the Sheriff's Department are likely to conflict with the interests of a client;
- (4) Whether the dual role of attorney and assistant judge creates an appearance of impropriety to either the client, the opposing party or to the superior court.

It is inevitable that an attorney who sits as an assistant judge with a superior judge in family court and who seeks to practice law in the same superior court in the same county, will be required to argue before that same superior judge in superior court. Such conduct would inevitably appear to a lay person as unethical and is not a course of conduct that promotes the confidence in the integrity of lawyers and courts.¹⁰

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interest of others; nor should he convey or permit others to convey they are in a special position to influence him . . .

⁴ EC 9-2, EC 9-8.

⁵ DR 8-101 (A) (2).

⁶ A.O. 10 V.S.A. Canon 3 (Supp. 1991)

Canon 3. A judge should perform the duties of his office impartially and diligently.

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. . . .

⁷ DR 5-105 (A).

⁸ DR 7-101 (A) (1), EC 7-2.

⁹ EC 7-3.

¹⁰ EC 9-2, EC 9-8.

It may be argued that the lawyer/assistant judge who sits exclusively in family court may represent a client in superior court if the lawyer believes that his or her judgment is not impaired and there is no appearance of impropriety and that any potential impropriety could be waived after full disclosure the existence of the inconsistent judicial and lawyer obligations to the client and to all parties.¹¹ However, even though the ethical concerns which apply to the lawyer might be resolved in this way it is difficult to conclude that a waiver could eliminate the appearance of impropriety which the Code of Judicial Conduct, Canon 2, imposes upon the lawyer who also happens to be an assistant judge.

Imputed Disqualification of Lawyer's Associates

A related issue raised by the requesting letter is whether a lawyer/assistant judge's partners or associates may practice in the court in which the lawyer sits as assistant judge. The authorities are clear that if one lawyer is prohibited from representing a client, all lawyers affiliated with the lawyer/assistant judge have the same imputed disqualifications.¹²

The disqualification of the lawyer/assistant judge's partners and associates imposed by DR 5-105 (D) results from: the appearance of impropriety; the opportunity to obtain or convey confidential information; and the potential to obtain unfair advantage and favoritism. In addition, there is the conflict with the court's interest to maintain impartiality along with inevitable burdens on court time due to motions to disqualify the lawyer/assistant judge's partners or associates.

Where both the lawyer/assistant judge and the partners and associates practice in the same court where the lawyer/assistant judge functions in a judicial capacity, there is the potential the lawyer/assistant judge as a member of the court will obtain confidential information that will be inadvertently disclosed to the court. In addition, the lawyer/assistant judge is potentially in a position to learn information from the confidences of the firm's clients that may affect the lawyer/assistant judge's impartiality. Moreover, it also may be argued that the influence obtained from the position of assistant judge may unfairly advantage that client. Therefore, when the lawyer/assistant judge and the partners and associates are in the same court Canons 4, 5 and 9 are triggered to disqualify the partners and associates.

This situation is analogous to cases concerning lawyer disqualification due to prior representation. The court assumes that confidences are disclosed between lawyers in the same firm and does not inquire into the exact nature of the confidence.¹³ Moreover, a lawyer may not disclose confidential information that could be detrimental to the client.¹⁴

In the *Cheng* case, an attorney who had access to a client's privileged information moved to the opposing party's firm. The Court concluded that Canons 4, 5, and 9 required the disqualification of the entire firm even though there were affidavits which stated that the attorney had not divulged any confidential information. The court reasoned that the risk of disclosure of confidential information and the potential for the adverse use of confidential information compelled disqualification under DR 5-105 (D).¹⁵

The court's reasoning in *Cheng* applies in this case. The assistant-judge is similarly situated to the attorney in *Cheng* who stated he had not divulged any confidential information. In both cases there exists the continuing danger that information will be shared among lawyers through close association that will taint a case by inadvertent disclosure. While the *Cheng* case involved at the prior representation of a client the principle is the same because the same potential risk of inadvertent disclosure of confidential information exists for the lawyer/assistant judge. In *Cheng*, the risk involved lawyer-lawyer disclosure, in this case it is the risk of disclosure from the lawyer/assistant judge to the court. In both cases the result is the unacceptable risk to the client of adverse use of confidential information.

An attempt to erect a "Chinese Wall" between the lawyer/assistant judge and the partners and associates will not overcome the risk of disclosure. The "Chinese Wall" is a screening device where the lawyer is isolated from the particular case and no confidential information is disclosed between lawyers. The court in *Cheng* rejected this device because of the continuing danger of disclosure through day-to-day contact between the lawyers. Thus, the court doubted the efficacy of the "Wall" and also expressed concern over public perception of impropriety.¹⁶

Just as the "Wall" in *Cheng* was deemed insufficient due to day-to-day contact, the same reasoning applies to the lawyer/assistant judge who sits in the same court where the lawyer/assistant judge's partners and associates practice law. The continuing risk of disclosure of client confidences and the appearance of impropriety to the public argues against the use of

¹¹ DR 5-101 (A), EC 5-21.

¹² DR 5-105 (D), WI: Opinions 13 n.6, No: Opinions 13 n.9, MN: Opinions 3 n.8, Nat'l Rpt. on Legal Ethics (1985), ABA Formal Opinion 142.

¹³ *Cheng v. GAF Corp.*, 631 F.2d 1052, 1056 (2d Cir. 1980) vacated 450 U.S. 902 (1981). The Supreme Court based their decision to vacate on an earlier ruling that the appeal of an order denying disqualification requires a final judgment in the underlying civil case.

¹⁴ DR 4-101 (8) (2).

¹⁵ *Id.* at 1057, 1058.

¹⁶ *Id.* at 1058.

screening devices like the "Wall" and for applying DR 5-105 (D) to disqualify the lawyer/assistant judge's partners and associates from practicing in that court.

The court's concern over public perception has an even greater application where a member of the court is involved. As the court found in *Cheng*, Canon 9's admonition against the unacceptable appearance of impropriety was insufficient to uphold disqualification of the entire firm.¹⁷ Not only is there a danger in the disclosure of client confidences to the court, but also because the lawyer/assistant judge's influence in the court may result in unfair advantage and favoritism to the lawyer/assistant judge's partners and associates. The suspicion of unfair advantage or favoritism creates an unacceptable appearance of impropriety which violates Canon 9 because public confidence in the law may be eroded and the integrity of the profession brought into question.¹⁸

In consideration of the unacceptable appearance of impropriety the lawyer/assistant judge's partners and associates should be disqualified from any court where the lawyer/assistant judge functions as a member of the court. The public perception that the partners and associates may have an unfair advantage and favoritism in their treatment is sufficient to extend the disqualification to any court where the lawyer/assistant judge has influence. Therefore, even if the lawyer/assistant judge sits only in family court, the influence from the non-judicial duties that make him or her a functioning member of the superior court should impose a disqualification on the lawyer/assistant judge's partners and associates from practicing in superior court.

From the standpoint of the court, the Judicial Code of Conduct would be violated when the partners and associates practiced in the same court as the lawyer/assistant judge was sitting. Assuming the recusal of the lawyer assistant judge from cases which directly involved the partners and associates, there would remain an unacceptable appearance of impropriety due to the potential for favoritism and the perception that the partners and associates have an unfair advantage due to the influence of the lawyer/assistant judge.¹⁹ As a result, there would be motions for disqualification of the lawyer/assistant judge and the partners and associates who practiced in the same court or a court where the lawyer/assistant judge functioned as a member of the court. As a practical matter the motions for disqualification would necessitate hearings using precious court time due to a controversy outside the litigation itself. For all these reasons DR 5-105 (D) requirement for disqualification should apply to the partners and associates of the disqualified lawyer/assistant judge.

The requesting lawyer draws an analogy to the practice restrictions applicable to part-time probate judges who also have active law practices. Probate judges are distinguished from assistant judges because even though they are part-time, their non-judicial functions do not overlap into the other courts. Similar to assistant judges, they cannot practice law in the court in which they sit as judge and, in addition, may not act as attorneys on probate matters in any court in the state.²⁰ Nevertheless, case law and ABA Opinions recognize that part time judges may have private practices before a court of which they are not members. However, there must be no appearance of favoritism or any other impropriety.²¹

CONCLUSION:

In conclusion, the lawyer who performs statutory duties as an assistant judge:

- (1) should not practice law in the court, hearing room and chambers where the lawyer sits as judge
- (2) should not practice law in a court where the non judicial duties and responsibilities make that lawyer a functioning member of the court and affects that lawyer's independent judgment and/or creates an appearance of impropriety. In addition, when that lawyer is disqualified from providing representation to a particular client or in a particular court, all lawyers affiliated with that lawyer are disqualified to the same extent.

¹⁷ *Id.* at 1058, 1059.

¹⁸ EC 9-2, EC 9-8.

¹⁹ Canon 2.

²⁰ 4 V.S.A. §354 (1988).

²¹ NY Bar Association Committee on Professional Ethics Opinion 571 7/8/85, ABA/BNA Lawyers Manual on Professional Conduct (1986-1990).