

UNPUBLISHED LEGAL ETHICS INQUIRY 79-3
March 14, 1979

Reference is made to your letter of March 6, 1979, in which you inquire whether your election to the position of Municipal Judge of the City of _____ would preclude other members of the law firm of _____, with whom you are associated, from engaging in the practice of criminal law before the circuit courts of West Virginia, courts of states other than West Virginia, and in the courts of the United States. You advise that you are a candidate for the office of Municipal Judge of the City of _____ at the primary election to be held on March 17, 1979.

You state in your letter that you are employed by _____ a legal corporation; that you own no stock in the corporation nor any other proprietary interest of any nature; that you are regarded as an employee for all purposes by the corporation; and that your practice is limited to civil litigation. You further state that, at present, you handle no criminal matters, although other members of the firm handle criminal cases in the circuit courts of West Virginia as well as the federal courts in West Virginia and other states. Those members of the firm of _____ who practice criminal litigation do not practice in the municipal court system in _____.

West Virginia Code § 8-10-2 provides for the creation of municipal courts and the appointment or election of judges of such courts. The criminal jurisdiction of a municipal court was the same as that of a justice of the peace or a magistrate until January 1, 1977. Article VIII, Section 11 of the Constitution of West Virginia, as amended by the Judicial Reform Amendment, provides as follows:

Until otherwise provided by law, all such [municipal] courts heretofore established shall remain and continue as now constituted, and with the same right of appeal, insofar as their jurisdiction to enforce municipal ordinances is concerned; but on and after January 1, 1977, any other jurisdiction exercised by such courts shall cease.

Prior to January 1, 1977, a municipal judge's jurisdiction was coextensive with that of a justice of the peace or a magistrate. He conducted trials for violations of municipal ordinances and certain state statutes. He also had jurisdiction to conduct preliminary hearings in felony cases. Thus, prior to January 1,

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1977, it was improper for a municipal judge to act as an attorney for defendants in criminal trials in any other courts. ABA Op. 242 (1942).

The Judicial Reform Amendment limited the criminal jurisdiction of municipal judges to violations of municipal ordinances from and after January 1, 1977. However, a municipal judge still exercises criminal jurisdiction and an appeal lies from a municipal court to the circuit court of the county. W. Va. Code §§ 8-2-10, 8-34-1; W. Va. CONST. art. VIII, § 11. Appeals from a municipal court are tried de novo in the circuit court of the county. W. Va. Code § 8-34-1.

A lawyer may in no event practice in the court in which he sits as a judge, even when presided over by another judge. Drinker, Legal Ethics 279 (1953); ABA Op. 142 (1935); N.Y.S.B.A. Op. 228 (1972). Similarly, a lawyer shall not accept employment in a matter upon the merits of which he has acted in a judicial capacity. DR 9-101(A).

Canon 7A of the Code of Judicial Conduct provides as follows:

A. Part-Time Judge. A part-time judge is a judge who serves on a continuing basis 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 a court on which he serves or in any court subject to the appellate jurisdiction of the court on which he serves, or act as a lawyer in a proceeding in which he has served as a judge or in any proceeding related thereto.

Canon 7A(1) expressly provides that a part-time judge is not subject to Canon 5F which prohibits a judge from practicing law. Section 45 of the Charter of the City of Charleston provides in part as follows:

The municipal judge shall be an attorney at law and shall have attained the age of 28 years at the date of the beginning of his term of service and shall have been a resident of this

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state for the period of five years and of the City of Charleston previous to the beginning of his term of service for the period of five years. He shall not appear as counsel in any criminal case in any court during his term of service. In the absence of, or in the case of the inability of the municipal judge to perform his duties, the municipal court clerk shall act as municipal judge in his stead, and in the event that neither the municipal judge nor the municipal court clerk can for any cause perform such duties, then the mayor shall act as municipal judge. (Emphasis supplied)

Whether a lawyer, while occupying a position as a part-time judge, should represent a defendant in a criminal proceeding in a court other than that over which he presides has been the subject of numerous opinions by the American Bar Association and the New York State Bar Association. In an opinion dated February 25, 1972, (N.Y.S.B.A. Op. 228) the New York State Bar Association reviewed its earlier opinions on the subject of criminal practice by part-time judges and stated:

However, a careful review of the ethical consideration leads to the conclusion that the question [whether a part-time judge should represent criminal defendants in other courts] should be answered in the negative, so that the judiciary will be held in the high esteem that the public demands and deserves.

In an earlier opinion dated March 23, 1971, N.Y.S.B.A. Op. 181, the New York State Bar Association stated that it would be improper for a city judge with city-wide misdemeanor jurisdiction to engage in the practice of criminal law in other courts, saying:

Such practice would weaken the confidence of the public in the impartiality and objectivity of the judiciary and would be subject to the suspicion that the judge was using the prestige of his position to further his private practice.

The fact that the compensation provided for the part-time judge may be meager does not furnish a justification for a contrary

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result. Limitations on a part-time judicial officer's private practice circumscribing criminal practice is a small price to pay, as the benefits to be derived by the public far outweigh the detriment to the individual judge.

Appeals from the Municipal Court of the City of _____ would necessarily be tried in the Circuit Court of _____ County. Furthermore, by express provision of the City Charter, the municipal judge is forbidden to practice criminal law in any courts. This Committee is of the opinion that it would be improper for the judge of the Municipal Court of the City of _____ to:

- (1) Try criminal cases in any court.
- (2) Represent in civil litigation a defendant who was tried in the Municipal Court for an offense related to or out of which the civil litigation arises.
- (3) Represent civil litigants against the City of _____ .

It is a fundamental ethical principle that no member of a law firm may accept any professional employment which any member of the law firm may not properly accept. N.Y.S.B.A. Op. 280; Drinker, Legal Ethics 106 (1953).

DR 5-105(D) provides:

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.

It seems clear that no member of the firm of _____ may undertake any employment which you, as Municipal Judge of the City of _____, would not be permitted to accept.

The fact that the firm of _____, with whom you are associated, is a legal corporation does not alter or affect the principles or ethical standards of conduct required of persons providing legal services. West Virginia Code § 30-2-5a, which authorizes the formation of legal corporations, provides in part:

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This section does not modify the law as it relates to the relationship between a person furnishing legal services and his client, nor does it modify the law as it relates to liability arising out of such a professional service relationship. Except for permitting legal corporations, this section is not intended to modify any legal requirement or court rule relating to ethical standards of conduct required of persons providing legal service.

The fact that you are not a stockholder and own no proprietary interest in the corporation does not alter the fact that you are associated in the practice of law with other lawyers. The members and employees of legal corporations who render legal services are subject to the same disciplinary rules and ethical considerations as sole practitioners or ordinary law partnerships. Any other view would lead to an anomalous situation.

One who assumes to act as a judge on one day and as an advocate on the next is confronted with inherent difficulties that ought to be avoided and deprecates the employment of such a system. To permit a judge with criminal jurisdiction or those associated with him in the practice of law to practice criminal law weakens the confidence of the public in the impartiality and objectivity of the judiciary. It leads to the suspicion that the judge and his associates are using the prestige of his position to further their private practice.

We, therefore, conclude that if you are elected judge of the Municipal Court of the City of _____ it would be improper for any member of the firm of _____ to:

- (1) Try criminal cases in the Circuit Court of _____ County.
- (2) Represent in civil litigation a person who was tried in Municipal Court for an offense related to or out of which the civil litigation arises.
- (3) Represent civil litigants against the City of _____.
- (4) Represent any party in Municipal Court.

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While a strict application of DR 5-105(D) would appear to preclude the members of the firm of _____ from practicing criminal law in any courts, we do not believe that such a position is necessary or appropriate in view of the constitutional limitation on the jurisdiction of municipal courts. The Committee is of the opinion that the fact that you might hold the office of Municipal Judge would not preclude the members of your firm from practicing criminal law in the circuit courts of West Virginia in counties other than _____ County, in the courts of other states, or in the federal courts of this state and other states.