

Judicial Ethics Opinions from the Advisory Committee on Judicial Ethics

[From time to time, NYPRR will publish an Opinion of the Advisory Committee on Judicial Ethics. The Opinions published are those selected by Justice George D. Marlow, Committee Chair, and Jeremy R. Feinberg, who serves among the Committee's Counsel. Permission to reprint the Opinion below was requested by NYPRR because of its significance to NY lawyers who appear before the Courts.]

The Advisory Committee on Judicial Ethics (www.nycourts.gov/ip/acje) responds to written inquiries from New York State's full- and part-time judges, candidates for elective judicial office, and quasi-judicial officials such as support magistrates, court attorney-referees, and judicial hearing officers. The committee's opinions interpret the Rules Governing Judicial Conduct (22 NYCRR Part 100), the Code of Judicial Conduct and Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36). Justice George D. Marlow chairs the committee of 26 judges, and Maryrita Dobiela, Esq. is its Chief Counsel.

Opinion 09-06

January 29, 2009

Digest: It would be permissible for a part-time lawyer/judge, representing a client in a court where there are some judges before whom the part-time lawyer judge may appear and others before whom the judge may not appear, to request that a case be assigned to the judge(s) in that court, before whom the part-time lawyer judge may appear, if the request is made before that matter has been assigned to a judge..

Rules: 22 NYCRR 100.2; 100.2(A); 100.4(G); 100.6(B)(1); 100.6(B) (2); Joint Opinion 08-210/09-01; Opinions 08-178; 08-132; 08-96; 04-40; 03-66; 02-87; 96-99 (Vol. XIV); 97-149 (Vol. XVI); 97-106 (Vol. XVI).

Opinion: A part-time acting city court judge who is permitted to practice law asks whether he/she may appear in a town or village court having one lawyer-judge and one non-lawyer judge if his/her case is assigned to the non-lawyer judge at the outset.

A judge must avoid impropriety and the appearance of impropriety in all the judge's activities (see 22 NYCRR 100.2) and must act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (see 22 NYCRR 100.2[A]). A part-time judge who is a lawyer may practice law (see 22 NYCRR 100.4[G]; 100.6[B] [1]) but may not do so in the court on which the judge serves or in any other court in the county in which his/her court is located before a judge who also is permitted to practice law (see 22 NYCRR 100.6[B][2]).

The Committee previously has advised that a part-time city court judge may practice law in another city court located in the same county where none of the presiding judges is permitted to practice law (see Opinion 04-40) and in a city court located in the same county where both full-time and part-time judges preside, only before a full-time judge (see Opinions 03-66 and 96-99 [Vol. XIV]). However, the Committee

has consistently advised that it is impermissible for a part-time lawyer judge to ask that a case be transferred to another judge or court solely to allow him/her to continue appearing in a case, or for a presiding or administrative judge to transfer a case to another judge for that reason (see Opinions 02-87; 97-149 [Vol. XVI]; 97-106 [Vol. XVI]; cf. Opinion 08-96).

Recently, though, the Committee has advised that a part-time lawyer judge may practice in a city court, in which both full-time judges and part-time judges who are permitted to practice law preside, if, at the outset, the city court clerk assigns all of the part-time lawyer judge's cases to a full-time judge, and so long as the lawyer judge thereafter will never appear on the case before a part-time city court judge who is permitted to practice law (see Opinion 08-132). Similarly, in Opinion 08-178, the Committee concluded that a part-time lawyer town or village justice may practice law in another town or village justice court located in the same county where his/her court is located where both a lawyer and a non-lawyer justice preside as long as his/her case is assigned at the outset to the non-lawyer justice and he/she will never appear in the case before the lawyer town or village justice. Therefore, the inquiring judge also may appear in a town or village court where both a lawyer-judge and a non-lawyer judge preside if his/her case is assigned to the non-lawyer judge at the outset, and he/she will never appear in the case before the lawyer town or village justice.

The inquiring judge also asks the meaning of the phrase "at the outset" for the purpose of determining when he/she may represent a client who has a case pending in a town or village court where both a lawyer-judge and a non-lawyer judge preside. Certainly, any judge who sits in a court may preside in any case properly commenced in the court. Nevertheless, the Committee is aware that case assignment procedures are not uniform throughout city, town and village courts. In some courts, a case is assigned to a specific judge's calendar, and he/she thereafter adjudicates the case from initiation through disposition, while in other courts, different judges may preside during different stages of the same case. While the Committee reaffirms that it is inappropriate for a part-time lawyer judge to request that a case already assigned to a judge who will preside in the matter through disposition be transferred to another judge or court solely to allow him/her to represent a party in the matter, the Committee sees no impropriety in a case being assigned initially to a judge (or judges) before whom the part-time lawyer judge may appear. Therefore, the meaning of the phrase "at the outset" necessarily depends on the case management procedures followed in a particular court.

The judge in the present inquiry poses the following example:

If a criminal defendant is given an appearance ticket returnable for arraignment before the lawyer-judge of the court, am I prohibited from appearing on his/her behalf because the case cannot then be reassigned (or transferred) to the non-lawyer judge upon my request, even if my request precedes the return date (and what if arraignment has already occurred before the lawyer-judge)?

In Opinion 08-132, the Committee advised that the inquiring fulltime city court judge may direct a city court clerk to assign all cases in which a party is represented by a lawyer-judge to a full-time judge in the court and thereafter ensure that the part-time judge appearing on the case never appears before any of the part-time city court judges. Accordingly, if the judge in the present inquiry seeks to practice in a court where a specific judge is assigned a case from the moment it is commenced (in a civil matter) or at arraignment (in a criminal matter) through disposition, he/she may not ask that the case be transferred

solely to allow him/her to represent a party (see Joint Opinion 08-210/09-01 [judge who is permitted to practice law need not discontinue an arraignment because defendant invokes his/her right to counsel during the arraignment and expresses his/her intention to hire an attorney who also is a part-time judge permitted to practice law and presides in the same county as the arraigning judge; once the case is commenced in the inquiring judge's court, he/she cannot transfer it to another non-lawyer judge solely to allow lawyer-judge to appear]). However, if the judge in the present inquiry seeks to practice in a court where a currently available judge handles only the current stage of the proceeding, for example, the arraignment, and the case thereafter will be assigned to a different judge through disposition, he/she may intervene before the assignment is made to ask that the case be assigned to a judge before whom he/she is permitted to practice.

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