



J. ANTHONY MCLAIN

Law Partners of Substitute Municipal Judge May Represent Clients in Municipal Court Provided Said Matters Are Completely Unrelated to Those Wherein Partner Presided As Substitute Judge

QUESTION:

The City of Anywhere has a full-time municipal court judge. I am one of four attorneys designated by the city council to serve as a substitute judge on the rare occasions when the full-time judge is on vacation, or is otherwise unavailable. We are paid by the hour. To the best of my memory, I have been asked to substitute on three or four afternoons and one or two morning sessions over the past year.

Once I was designated a substitute judge, I stopped taking any city court cases. My question, however, is whether my designation as a substitute judge on this rare basis would disqualify other members of my firm from representing city court clients? We obviously check before I substitute to ensure that no one has a case on the same day.

ANSWER:

The *Alabama Rules of Professional Conduct* allow your law partners to represent criminal defendants in municipal court, even though you serve as a substitute municipal court judge, provided that the matters wherein your law partners represent these criminal defendants are completely unrelated to those wherein you presided as a substitute judge.

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DISCUSSION:

The Disciplinary Commission, in RO-91-18, dealt with the issue of whether a lawyer was prohibited from representing applicants before a state agency licensure board where that lawyer's partner served as a hearing officer. The commission held that the lawyer could represent applicants before this same licensure board even though the lawyer's partner served as a hearing officer for that same agency, provided that the representation involved matters completely unrelated to those in which the partner presided as a hearing officer. Quoting from RO-89-115, the commission determined that if the matters are unrelated, representation would not be prohibited subject to consent by both parties involved, and the attorney's determination that he could render undiluted and vigorous representation to the client.

In RO-84-190, the inquiring attorney served as a municipal judge. The lawyer had been contacted by a police officer of that same municipality, concerning possible representation of him in a criminal case in circuit court. The case arose out of the shooting and killing of a suspect while fleeing from police officers, one of whom was the lawyer's prospective client.


The Disciplinary Commission determined that there would be no ethical impropriety in the lawyer representing the police officer should he be indicted, and in representing the city should a civil suit be filed against the city by the personal representative of the slain man if, in the capacity as a municipal judge for that same city, the lawyer did not and would not act upon any facet of the merits concerning the possible indictment or civil suit against the city.

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Acknowledgment is made of Rule 1.10(a) of the *Alabama Rules of Professional Conduct* which states:

“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.”

However, the Disciplinary Commission interprets this rule to apply to general conflicts questions and issues, since the rules specified in 1.10(a), with the exclusion of Rule 2.2, deal with conflict of interest.

While there would obviously be a conflict in your handling representation of criminal defendants in municipal court wherein you preside from time to time as a substitute municipal judge, such a conflict would appear to be more personal in nature, rather than firm-wide and thus not imputed to your law partners.

Due to the personal nature of this conflict, and the conflict not being imputed to your remaining law partners, your law partners are therefore not prohibited from representing criminal defendants in the same municipal court where you, from time to time, preside as substitute judge, provided that the matters being handled by your law partners are in no way related to those matters which are presided over by you in your capacity as substitute judge.

The Disciplinary Commission would also encourage you to disclose to the governing body of the municipality that employs you in this substitute municipal court judge capacity that your law partners will continue to represent criminal defendants in municipal court, but only in those cases in which you have absolutely no connection or participation.

This determination is consistent with a previous decision of the Disciplinary Commission, specifically, RO-93-12, wherein the commission determined that a lawyer could represent clients before a state agency even though that lawyer’s partner served as a hearing officer for the agency, provided that the lawyer’s representation involved matters completely unrelated to those in which the partner presided as a hearing officer. The commission relied upon Opinion 1990-4 of the Committee on Professional Ethics of the Association of the Bar of the

City of New York which had held that a lawyer or members of his firm could not represent claimants before a commission for whom the lawyer served as an administrative law judge or a mediator. The qualification was that the lawyer served frequently and repeatedly as a part-time administrative law judge for this agency. On the other hand, the opinion also held that the lawyer



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State Bar Employee Earns National Recognition from ABA

Alabama State Bar General Counsel Tony McLain is among seven recipients of the 2009 CoLAP Meritorious Service Award sponsored by the American Bar Association Commission on Lawyer Assistance Programs. This award is presented to disciplinary counsel who have distinguished themselves by advocating for or working with lawyer assistance programs and who have gone beyond just cooperating with such programs.

McLain was nominated by Alabama Lawyer Assistance Program Executive Director Jeanne Marie Leslie who wrote, “...I am recommending him for this award because he has always valued the work our program does. I cannot imagine working with a general counsel who did not respect or value the services ALAP provides. Mr. McLain is a man of integrity; he is a lawyer’s lawyer and understands lawyers, the bar and the public benefit when our offices work together.”

Bravo, Tony!

He will pick up the award at the National Conference for Lawyer Assistance Programs’ annual dinner in Phoenix in October. Don’t forget the golf clubs!

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and members of his firm would be allowed to represent claimants before this same commission *if the lawyer served only occasionally and sporadically as a judge pro tempore*.

The commission also pointed out, consistent with other opinions and provisions of the prior *Code of Professional Responsibility*, that the 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. [RO-1999-03] ▲▼▲

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