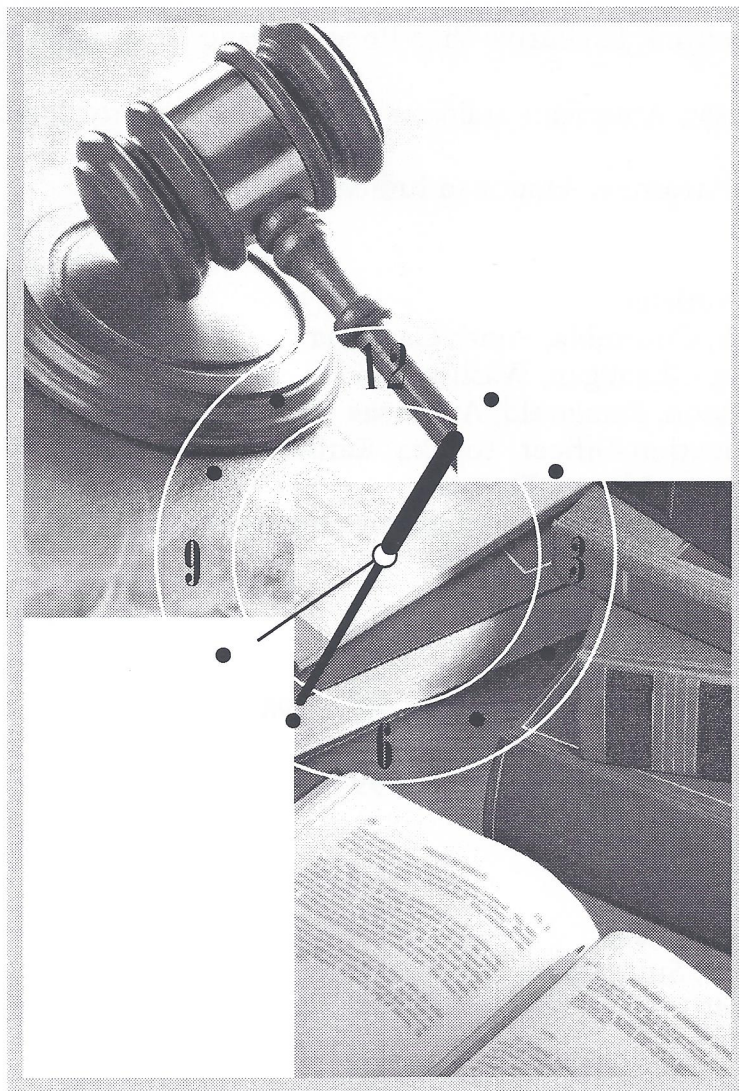


# An Ethics Guide for Part-Time Lawyer Judges



**Cynthia Gray • Nancy Biro**  
**American Judicature Society**



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Founded in 1913, the American Judicature Society is an independent, nonprofit organization supported by a national membership of judges, lawyers, and other members of the public. Through research, educational programs, and publications, AJS addresses concerns related to ethics in the courts, judicial selection, the jury, court administration, and public understanding of the justice system.

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# INTRODUCTION

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## *ETHICAL STANDARDS FOR JUDGES*

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In order to have confidence in the decisions handed down by the justice system, the public must have confidence in the integrity, impartiality, and independence of individual judges. To promote adherence to high standards by judges, every state has adopted a code of judicial conduct that is enforced by each state's judicial conduct organization and supreme court with sanctions ranging from a private advisory letter to removal.

Although most judges serve full time, many courts rely on part-time judges if the caseload in a locality is more than the full-time judges can handle but not enough to justify another full-time position. Moreover, most states rely on temporary judges from time-to-time to clear up a backlog; in the interim between a judge's resignation, retirement, or death and election or appointment of a replacement; to preside in a case from which the assigned judge is disqualified; or to fill short vacancies created by medical leave, military service, jury duty, disciplinary action, vacation, or other absences. Often the temporary

judge is a retired judge who has agreed to serve on assignment when needed.

Because part-time judges exercise on a part-time or temporary basis the same judicial power as full-time judges, the actions of a part-time judge also affect the public's confidence in the judicial system. Therefore, part-time judges are required to adhere to most of the same ethical standards as full-time judges, particularly while they are sitting as judges.

In all states but Montana, the code of judicial conduct is based on the 1990 American Bar Association Model Code of Judicial Conduct or its predecessor, the 1972 model code. (The code in Montana is based on the 1972 American Bar Association Canons of Judicial Ethics.) The general standards of both the 1990 model code and the 1972 code are very similar.

Under the 1990 model code, full-time judges and part-time judges are required:

- to avoid the appearance of impropriety (Canon 2);
- to respect and comply with the law (Canon 2A);

- to give precedence to judicial duties over all other activities (Canon 3A);
- to be faithful to the law and maintain professional competence in it (Canon 3B);
- to be “patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom they deal in an official capacity...” (Canon 3B(4));
- to perform judicial duties without bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status (Canon 3B(5));
- to diligently discharge administrative responsibilities without bias or prejudice (Canon 3C(1));
- to maintain professional competence in judicial administration (Canon 3C(1));
- to cooperate with other judges and court officials in the administration of court business (Canon 3C(1));
- to require staff, court officials, and others subject to the judge’s direction and control to observe the standards of fidelity and diligence that apply to the judge (Canon 3C(2));
- to require staff, court officials, and others subject to the judge’s direction and control to refrain from manifesting bias or prejudice in the performance of their official duties (Canon 3C(2)); and
- to inform the appropriate authority if the judge has knowledge that another judge has committed a violation of the code that raises a substantial question as to the other judge’s fitness for office or that a lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to the lawyer’s honesty, trustworthiness, or fitness (Canon 3D).

Like full-time judges, part-time judges are prohibited from:

- “commend[ing] or criticiz[ing] jurors for their verdicts other than in a court order or in a proceeding” (Canon 3B(10));
- initiating or considering “ex parte or other communications concerning a pending or impending proceeding” (Canon 3B(7));
- making unnecessary appointments (Canon 3C(4));
- exercising the power of appointment partially or on a basis other than merit (Canon 3C(4));

- engaging in nepotism or favoritism (Canon 3C(4)); and
- approving compensation of appointees beyond the fair value of services rendered (Canon 3C(4)).

Under the 1990 model code, disqualification of both full-time judges and part-time judges is required:

- if the judge has a personal bias or prejudice concerning a party or a party's lawyer (Canon 3E(1)(a));
- if the judge has personal knowledge of disputed evidentiary facts concerning the proceeding (Canon 3E(1)(a));
- if the judge served as a lawyer in the matter in controversy (Canon 3E(1)(b));
- if a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter (Canon 3E(1)(b));
- if the judge has been a material witness concerning the matter (Canon 3E(1)(b));
- if the judge knows that he or she, individually or as fiduciary, has an economic interest in the subject matter in controversy or in a party to the proceeding (Canon 3E(1)(c));

- if the judge knows that the judge's spouse, parent, or child wherever residing or any member of the judge's family residing in the judge's household has an economic interest in the subject matter in controversy or in a party to the proceeding (Canon 3E(1)(c)); and

- if the judge, the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person, is a party to the proceeding; is an officer, director, or trustee of a party; is acting as a lawyer in the proceeding; is, to the judge's knowledge, likely to be a material witness in the proceeding; or is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding (Canon 3E(1)(d)).

A comprehensive discussion of all the ethical standards applicable to both full-time and part-time judges is beyond the scope of this *Guide*, but other resources are available. *See, e.g.,* Gray, "Ethical Standards for Judges," in *Handbook for Judicial Conduct Commissions* (AJS 1999); Shaman, Lubet, and Alfini, *Judicial Conduct and Ethics* (Michie 1995).



## ***DEFINING WHO IS A PART-TIME JUDGE***

Judicial officers who serve less than full time or only temporarily are called judges in some states but may also be called, depending on the state, hearing officers, commissioners, magistrates, referees, masters, fact finders, arbitrators, pro tempore judges, pro tem judges (an abbreviated form of pro tempore judges), special judges, acting judges, senior judges, ad hoc judges, recall judges, substitute judges, or reserve judges.

Three factors determine whether a judge is a full-time judge or a part-time judge: how often the judge serves, whether he or she is allowed to devote time to another occupation, and how much he or she is paid.

If all of the following questions are answered in the affirmative, a judge is a part-time judge:

1. Does he serve on a continuing or periodic basis? For example, if a judge serves one-half of each working day, or if he serves every Monday, the answer is "Yes."
2. Is he permitted by law to devote time to some other profession or occupation? The answer to this question will be found in the statutes or the common law of the jurisdiction in which he serves.
3. Is the judge's compensation less than that of a full-time judge at the same jurisdictional level? If a judge is paid on a full-time basis but works only part-time because the docket in his court is up to date, he is a full-time judge . . . .

Thode, *Reporter's Notes to [1972] Code of Judicial Conduct* at 101 (ABA 1973).



**What is your title? How often do you serve? Are you permitted by law to devote time to some other profession or occupation? Is your compensation less than that of a full-time judge at the same jurisdictional level?**

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The differences among the states in how their courts are organized are compounded for part-time service. The 1972 American Bar Association Model Code of Judicial Conduct had three categories of judges who served less than full-time: part-time judges (those who serve on a continuing or periodic basis, but are 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); judges pro tempore (those who are appointed to act temporarily as a judge); and retired judges who receive the same compensation as full-time judges and are eligible for recall to judicial service.

Reflecting the “increasing diversity of kinds of judicial service” (Milord, *The Development of the ABA Judicial Code* at 57 (ABA 1992)), the 1990 model code created four categories of judicial service other than in a full-time capacity. The application section of the 1990 model code defines the four categories in general terms that depend on the facts of the particular judicial service.

The four categories of part-time judges are:

- Retired judges subject to recall who by law are not permitted to practice law.
- Continuing part-time judges.

- Periodic part-time judges.
- Pro tempore part-time judges.

**A retired judge subject to recall who by law is not permitted to practice law** is not specifically defined by the model code, but is a judge who has retired and has, through whatever system is used in the state, made himself or herself available for temporary or part-time assignments as needed by the judiciary. They are called senior judges in many states.

**A continuing part-time judge** is defined as “a judge who serves repeatedly on a part-time basis by election or under a continuing appointment, including a retired judge subject to recall who is permitted to practice law.”

**A periodic part-time judge** is defined as “a judge who serves or expects to serve repeatedly on a part-time basis but under a separate appointment for each limited period of service or for each matter.”

**A pro tempore part-time judge** is defined as “a judge who serves or expects to serve once or only sporadically on a part-time basis under a separate appointment for each period of service or for each case heard.”

States have adapted the model code application section to reflect the organization and titles used in their state. For example, the categories of judicial service referred to in the Arizona code are “retired judge available for assign-

ment," "part-time judge," "pro tempore part-time judge," and "pro tempore full-time judge." The Virginia code uses the terms "judge pro tempore," "retired judge," "senior judge or justice," and "substitute judge." The categories in the California code are "retired judge serving in the assigned judges program," "retired judge as arbitrator or mediator," and "temporary judge, referee, or court-appointed arbitrator."

Whenever this *Guide* refers to "part-time judges," it is referring to all types of part-time or temporary judicial officers. If the rule or exception being discussed does not apply to all categories, the categories that are included in the discussion are specifically indicated in boldface type.

## ***ETHICAL STANDARDS FOR PART-TIME LAWYER JUDGES***

Part-time judges who practice law confront ethical difficulties not faced by full-time judges, specifically how to keep the two positions completely separate. While the judiciary needs to be protected from the harm to its reputation for integrity, independence, and impartiality that can be caused by part-time judges, at the same time, it would be inappropriate to subject part-time judges to the same range of restrictions as full-time judges when their part-time judicial status means they do not receive full-time judicial pay.

To balance those interests, the 1990 model code created exemptions from its rules for the four types of part-time judges. There are two types of exemptions: those rules that never apply to a part-time judge and those rules that do not apply except when the judge is serving as a judge.



**Under the definitions in the ABA 1990 model code, are you:**

**A retired judge subject to recall who is not permitted to practice law** \_\_\_\_\_

**A continuing part-time judge** \_\_\_\_\_

**A periodic part-time judge** \_\_\_\_\_

**A pro tempore part-time judge** \_\_\_\_\_

Under paragraph B of the application section of the model code, a **retired judge subject to recall who by law is not permitted to practice law** is not required to comply:

- **except while serving as a judge**, with Canon 4F [service as arbitrator or mediator];
- **at any time**, with Canon 4E [fiduciary service].

Under paragraph C of the application section of the model code, a **continuing part-time judge** is not required to comply:

- **except while serving as a judge**, with Canon 3B(9) [comment on pending or impending proceedings];
- **at any time**, with Canon 4C(2) [appointment to governmental commissions], Canon 4D(3) [participation in a business entity], Canon 4E(1) [fiduciary service prohibited except for judge's family], Canon 4F [service as arbitrator or mediator], Canon 4G [practice of law], Canon 4H [compensation, reimbursement, and reporting requirements], Canon 5A(1) [political conduct of all judges and candidates], Canon 5B(2) [non-judge candidate for appointment], and Canon 5D [all other political activity by non-candidate incumbent judges].

Under paragraph D of the application section of the model code, a **periodic part-time judge** is not required to comply:

- **except while serving as a judge**, with Canon 3B(9) [comment on pending or impending proceedings];
- **at any time**, with Canon 4C(2) [appointment to governmental commissions], Canon 4C(3)(a), [service as officer of a charitable or law-related organization], Canon 4D(1)(b), [transactions with persons likely to come before the judge's court], Canon 4D(3) [participation in a business entity], Canon 4D(4) [management of financial interests to minimize disqualification], Canon 4D(5) [acceptance of gifts, bequests, favors, and loans], Canon 4E [fiduciary service], Canon 4F [service as arbitrator or mediator], Canon 4G [practice of law], Canon 4H [compensation, reimbursement, and reporting requirements], Canon 5A(1) [political conduct of all judges and candidates], Canon 5B(2) [non-judge candidate for appointment], and Canon 5D [all other political activity by non-candidate incumbent judges].

Under paragraph E of the application section of the model code, a **pro tempore part-time judge** is not required to comply:



- **except while serving as a judge**, with Canon 2A [act at all times to promote confidence in the judiciary's impartiality and integrity], Canon 2B [inappropriate influence and use of judicial office], Canon 3B(9) [comments on pending or impending proceedings], and Canon 4C(1) [consultation with executive or legislative bodies];
- **at any time**, with Canon 2C [membership in discriminatory organizations], Canon 4C(2) [appointment to governmental commissions], Canon 4C(3)(a) [service as officer of a charitable or law-related non-profit organization], Canon 4C(3)(b) [solicitation of funds for a charitable or law-related organization], Canon 4D(1)(b) [transactions with persons likely to come before the judge's court], Canon 4D(3) [participation in a business entity], Canon 4D(4) [management of financial interests to minimize disqualification], Canon 4D(5) [acceptance of gifts, bequests, favors, and loans], Canon 4E [fiduciary service], Canon 4F [service as arbitrator or mediator], Canon 4G [practice of law], Canon 4H [compensation, reimbursement, and reporting requirements], Canon 5A(1) [political conduct of all judges and candidates], Canon 5B(2) [non-judge candidate for appointment], and Canon 5D [all other political activity by non-candidate incumbent judges].

Unless otherwise indicated, references to canons in the code of judicial conduct in this *Guide* are to the 1990 ABA model code. The 1990 model code retained most of the basic principles of the 1972 ABA model code but made several substantial changes and contains many differences in its details. The model code is not binding on judges unless it has been adopted in their jurisdiction.

However, most states depart from the model when adopting a code of judicial conduct and what restrictions apply to part-time or temporary judges is one of the areas in which states have frequently deviated from the model. This *Guide* points out some of the differences between the model code and state codes. You should also read this *Guide* with a copy of your state's code of judicial conduct at hand to enable an accurate comparison.

## ***USING THE ETHICS GUIDE FOR PART-TIME LAWYER JUDGES***

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This *Ethics Guide for Part-Time Lawyer Judges* is a self-study guide that covers key issues in judicial ethics for part-time judges who also practice law.<sup>1</sup> After using the self-study guide, you should be able to identify ethical issues posed by your dual roles in the justice system as judge and lawyer and to comply with the ethical rules applicable to those issues.

The *Guide* has sections on:

- *Misuse of office.*
- *When a part-time lawyer judge's law practice requires disqualification.*
- *How being a part-time judge affects a lawyer's practice.*
- *Serving as an arbitrator or mediator.*
- *Serving as a fiduciary.*
- *Business and financial activities.*
- *Community involvement.*
- *Political activities.*

The *Guide* outlines the law in each area, examining the rules in the 1990 model code and considering the basis

for the rules. In addition to case law in which part-time judges have been disciplined for violating the code of judicial conduct, the *Guide* relies on judicial ethics advisory opinions that interpret the limitations on part-time judges and the exceptions to the code for part-time judges. Over 40 states have a judicial ethics advisory committee to which a judge can submit an inquiry regarding the propriety of contemplated future action. See *Judicial Ethics Advisory Committees: Guide and Model Rules* (AJS 1996). Sometimes committees in different states have reached different conclusions about the best way to resolve the conflicts between being a judge and being a lawyer; the *Guide* points out those areas of disagreement.

Finally, the *Guide* includes questions designed to involve you more in the discussion and to guide you in examining what specific rules apply in your particular state, the cases in which your practice will require disqualification, and what ways your practice and other activities should be changed by your judicial duties. Some of the questions ask you to list the ethical questions you have faced, how you resolved them, and what steps you can take to lessen the number of times conflicts arise between judicial duties and attorney responsibilities. When there is a difference

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<sup>1</sup> In over 18 states, at least some of the part-time judges are not lawyers. In fact, Texas has 1,200 non-lawyer judges, and New York has over 1,600.





## Self-Test

*Judge David Perry is a continuing part-time judge who sits one day a week in the 16th District Court of the 5th Judicial Circuit located in Sampson County. His duties include issuing warrants, arraigning defendants charged with felonies, and presiding over misdemeanor and small claims cases.*

1. At the opening of a court session, he asks whether any person having business before the court has any relationship to him or his law firm, Perry and Berg. Four people come forward. **Is he disqualified from a case:**

1a. If his partner Karen Berg is currently representing the defendant in a probate case that has no relation to the criminal charges before Judge Perry?

Yes

No

1b. If Judge Perry is currently representing the arresting police officer in a civil rights case that is unrelated to the criminal charges before him?

Yes

No

1c. If Judge Perry represented the defendant now charged with assault one time, five years earlier in a routine real estate closing?

Yes

No

1d. If Judge Perry represented the defendant, now charged with murder, on several criminal charges, including aggravated assault, over a period of five years, when the representation ended a year earlier and the current charges arise out of different events?

Yes

No

2. Jennifer Morris represents the defendant in a misdemeanor case ready for trial. **Is Judge Perry disqualified from the case:**

2a. If Morris is an associate of a firm in which Judge Perry is a partner?

Yes

No

2b. If Morris is of counsel to a firm in which Judge Perry is employed as an associate?

Yes

No

2c. If Judge Perry shares office space with Morris, although they are not associated in the practice of law?

Yes

No

2d. If Judge Perry has a fee sharing agreement with Morris in unrelated cases?

Yes

No

2e. If Judge Perry is co-counsel to Morris in pending cases?

Yes

No

2f. If Judge Perry and Morris are both part-time public defenders?

Yes

No

*(continued)*



2g. If Morris is opposing counsel to Judge Perry in an unrelated action in another court?

Yes

No

3. At the request of the police, Judge Perry issued a search warrant for premises occupied by Nancy Brill, who is arrested based on evidence discovered during the search and charged with arson. Subsequently, Brill asks Perry to represent her as an attorney in the criminal case, which has been assigned to another judge.

3a. May Perry represent her?

Yes

No

3b. May his partner Karen Berg represent her?

Yes

No

4. Judge Perry presides in a case in which Peter Lange was charged with disorderly conduct. The owner of the store that Lange damaged during the incident visits Perry's law office and asks Perry to represent him in a civil action against Lange. May he do so?

Yes

No

5. May Perry represent a client in:

5a. The 12th District Court of the 5th Circuit?

Yes

No

5b. The 10th District Court of the 6th Circuit?

Yes

No

6. A client asks Judge Perry to defend him in a criminal case in a court other than one in which he serves. May he take the case?

Yes

No

7. Karen Berg suggests to Perry that they begin to concentrate the practice of their firm on criminal cases, including misdemeanors and cases in which the state will be represented by the assistant prosecutor that appears in Judge Perry's courtroom. Should he agree to that proposal?

Yes

No

8. Sampson County asks Judge Perry to act as a part-time prosecutor. May he take the position?

Yes

No

9. Sampson County asks Judge Perry to be the county attorney. He would not prosecute cases but would review contracts, help draft ordinances, and give legal advice to the county and its employees, including the sheriff's department. May he take the county as a client?

Yes

No

10. A client who has slipped and fallen on the sidewalk in front of a county building asks Judge Perry to represent him in a suit against Sampson County. May he take the case?

Yes

No

11. May Judge Perry represent a bail bonding company that posts bonds in his court?

Yes

No

12. ADR Systems of Sampson County, a private agency, asks Judge Perry to serve on its staff of arbitrators. May he accept the position?

Yes

No

13. ADR Systems shows Judge Perry a proposed brochure with pictures of its arbitrators, including one of Perry in his robes and identified as "The Honorable David Perry." His part-time judicial service is noted as part of his biographical information in a format similar to that of the other arbitrators for the agency.

13a. Should he approve the brochure?

Yes

No

13b. If the picture of him in his robes and the "Honorable" are removed, may he approve the brochure?

Yes

No

14. Jean Baldwin, a client to whom Judge Perry is not related, asks him to serve as the executor of her estate. May he do so?

Yes

No

14a. After Baldwin's death, Perry begins to act as executor. The estate becomes embroiled in a dispute involving some of the real estate that is one of the assets of the estate, and a suit is filed in the 16th District Court of the 5th Judicial Circuit for Sampson County. May he continue to act as executor?

Yes

No

15. Judge Perry presides and practices in the small town of Merrillville.

15a. May he purchase a building with Karen Berg, one of the other attorneys in Merrillville with a litigation practice?

Yes

No

15b. May he agree to share representation and split fees with Berg?

Yes

No

15c. May he rent office space in a building he owns to Berg?

Yes

No

16. There is an opening on the Sampson County Economic and Industrial Development Commission after a local attorney resigns upon becoming a full-time judge. May Judge Perry accept an appointment to the commission?

Yes

No

17. Judge Perry has been a member of the school board for many years, winning the position in non-partisan elections that have never been contested. May he continue to serve after becoming a part-time judge?

Yes

No

18. May Judge Perry serve on the board for a senior center?

Yes

No

*(continued)*

19. May Judge Perry continue as the treasurer of a county police association?

- Yes
- No

20. May Judge Perry be a member of the board of trustees of a non-profit corporation that provides public defender services to his court?

- Yes
- No

21. May Judge Perry be treasurer of a community Independence Day parade responsible for depositing proceeds and paying bills?

- Yes
- No

22. May Judge Perry sell raffle tickets or promote concessions at a fund-raiser for a community Independence Day parade?

- Yes
- No

23. May Judge Perry receive an award during a fund-raising dinner for a senior center for which he is a board member?

- Yes
- No

23a. If he is a pro tempore part-time judge, may Judge Perry receive an award during a fund-raising dinner for a senior center for which he is a board member?

- Yes
- No

24. May Judge Perry serve as a member of the state or county executive committee of a political party?

- Yes
- No

25. May Judge Perry attend fund-raising functions for a candidate for county commissioner?

- Yes
- No

26. May Judge Perry's law firm, Perry and Berg, make contributions to a political candidate in the firm name?

- Yes
- No

26. May Karen Berg make a contribution to a political organization in her own name?

- Yes
- No

28. Judge Perry would like to run for city council. Must he resign from his part-time judgeship?

- Yes
- No

29. Judge Perry would like to run for a full-time judge position. Must he resign from his part-time judgeship before becoming a candidate?

- Yes
- No

30. While running for another judicial office, may Judge Perry use the title "judge" in campaign literature?

- Yes
- No

Answers at page 120.

# MISUSE OF OFFICE

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The power of the judicial office is intended to advance the administration of justice, and the prestige of the office is intended to ensure public confidence in the courts' decisions. A judge abuses the power of the judicial office when he or she makes a decision as a judge based, not on the merits of the case, but on a personal motivation, for example, to do a favor for a relative, to retaliate against someone, or to send a political message. A judge misuses the prestige of the office if he or she asks for a favor to advance private interests. The opportunity to weaken the power and prestige of judicial office through abuse for extra-judicial purposes is present for part-time judges as well as full-time judges.

To prevent the abuse of the judicial office, Canon 2B of the 1990 model code provides:

A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit

others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

All states have identical or similar provisions, and part-time judges are not allowed to make decisions as judges based on personal relationships nor allowed to use the prestige of the judicial office to advance private interests.<sup>2</sup>

## ABUSING THE POWER OF THE JUDICIAL OFFICE

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A part-time lawyer judge violates Canon 2B when he or she makes a decision as a judge based, not on the merits of the case, but to benefit a client.

Most part-time judges resist the temptation to use their power to advance their clients' interests. However, the potential for abuse of power by a part-time judge on behalf of clients is illustrated by *In the Matter of Tabak*, 362 N.E.2d 475 (Indiana 1977). The attorney in that case was appointed as a pro tempore judge of a municipal court

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<sup>2</sup> The application section of the 1990 model code does state that pro tempore part-time judges are exempt from Canon 2B except while serving as a judge. However, a pro tempore part-time judge could invoke the office when asking for a favor even while not serving, and it is difficult to believe that the drafters of the model code intended that pro tempore part-time judges should be allowed to misuse the prestige of office at any time.



and obtained from a secretary at his law firm the names of four firm clients who had been charged with moving violations in that court. At his request, the bailiff brought the charging documents to him and, without the clients' knowledge, changed their pleas to guilty, imposed a fine of \$1.00, in addition to the standard court costs of \$44.00, and suspended the fine and costs.

In concluding the lawyer should be disbarred for his misconduct as a part-time judge, the Indiana Supreme Court stated:

In the present case, the respondent, as an attorney, was placed within a position of trust in the judicial system; he was assigned the duties of a judge pro tempore. In such capacity, he was expected to exercise his professional judgment in reaching all decisions; he was expected to act in a fair and impartial manner. The only way our judicial system can effectively function is if all members meet such expectations and honor the trust that is placed in the exercise of judicial responsibility.

Instead of accepting his responsibilities, respondent chose to use his brief judicial power to further personal objectives. He sought out legal matters relating to his clients and disposed of the matters so that they would be satisfied with the legal services provided by his law firm. This conduct ignores any concept of trust and responsibility and demonstrates a total disregard

to the ethical requirements of all attorneys and judges.

*See also In the Matter of Feeney, Determination* (New York Commission on Judicial Conduct December 24, 1987) (public censure for, among other misconduct, leaving a client's case on the court calendar without issuing a warrant when the client failed to appear, creating the appearance of favoritism).

Other examples:

- A part-time lawyer judge was censured for transferring cases out of his court so that his law partner could represent one of the parties in another court. The New York Commission on Judicial Conduct found that this practice "created the impression that the courts were being manipulated to benefit the [part-time judge's] private law practice, to the possible inconvenience of the parties and to the burden of other courts that had to assume an additional caseload." *In the Matter of Bruhn, Determination* (New York Commission on Judicial Conduct December 24, 1987).
- A former part-time judge was permanently enjoined from seeking judicial office, disbarred, and fined \$100,000 for, among other misconduct, creating a fraudulent court decree purporting to dissolve a marriage and provide for child custody, apparently using a signature of another judge available to

him as a part-time judge. The Indiana Supreme Court found that he had flagrantly breached the trust placed in him as a judge and as an attorney. *In the Matter of Edwards*, 694 N.E.2d 701 (1998).

## ***MISUSING THE PRESTIGE OF THE JUDICIAL OFFICE***

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### ***Asking for favors***

The prestige of the judicial office may make it more likely that people—particularly other judges, court personnel, prosecutors, and law enforcement officers—will be willing to grant a favor requested by a judge. Thus, a part-time lawyer judge misuses the prestige of office if he or she attempts to influence the outcome of a pending investigation or proceeding involving a client—or when the judge appears to do so.

- A part-time municipal court judge was publicly reprimanded for writing a letter on behalf of a client to the other municipal judge before whom the litigation was pending. The Supreme Court of New Jersey found that the judge attempted to use his power, prestige, and influence as a judge to further the personal and private purposes of his clients. *In re Murray*, 458 A.2d 116 (New Jersey 1983).
- A part-time judge was removed for various misconduct including trying to influence prosecutors and the police to file criminal charges against an individual with whom a client had a property dispute. In a conversation with one of the police officers, the judge told the officer “one hand washes the other.” Subsequently, the judge spoke with an assistant district attorney who refused to file charges but referred the matter to mediation when, ordinarily, matters are not referred to mediation by the district attorney’s office unless criminal charges are pending. During his conversations with the police chief, the judge offered to use his influence with the town board to reward the chief for instigating the complaint. The New York Commission on Judicial Conduct had found that the judge had confused his roles as judge and practicing attorney as well as used the prestige of his office on behalf of a client. *In the Matter of Romano*, 93 N.Y.2d 161 (New York 1999).
- A part-time judge was censured for, among other misconduct, approaching the complaining witness in a criminal matter against his client. The judge had summoned the complaining witness to the courthouse where, the witness knew, he presided as a judge and conveyed to her

through his private secretary, rather than the prosecutor, a proposed settlement. The New York Commission on Judicial Conduct concluded that, rather than carefully distinguishing between his roles as lawyer and judge, the judge had confused them and that, consequently, a reasonable person might have questioned whether he was using his judicial office to benefit a client of his legal practice. *In re Sack*, Determination (New York Commission on Judicial Conduct September 29, 1994).

- A part-time municipal court judge was publicly reprimanded for intervening on behalf of a client in a zoning violation case in another municipal court by calling the court clerk, the township zoning officer, and the presiding judge. The Supreme Court of New Jersey stated that it did not need to find that the judge's conduct was an attempt to intimidate the court clerk to find a violation. *In the Matter of Santini*, 597 A.2d 1388 (New Jersey 1991).
- A part-time lawyer judge was publicly reprimanded for using his influence to have charges against his law firm's clients reduced. Charges of driving under the influence or similar charges were reduced to either reckless driv-

ing or littering by the judge or the arresting officer in four cases in which another member of the judge's firm had contact with the defendant or the arresting officer. In one case, the firm billed the defendant for a \$300 fee. *In the Matter of McInnis*, 258 S.E.2d 91 (South Carolina 1979).

Noting the potential for confusion and public misperception whenever a part-time judge appears in judicial proceedings in a non-judicial role, the Washington Commission on Judicial Conduct stated that, to avoid any misunderstanding, a part-time judge appearing as a lawyer in a judicial proceeding has an affirmative responsibility to clearly identify his or her representative role. *In re Hutchinson*, No. 96-2405-F-65, Commission decision (Washington Commission on Judicial Conduct February 11, 1998). In the case before it, a prosecutor had referred to a part-time judge as "Judge" when he appeared in court at an arraignment and bail hearing for a former pastor charged with child molestation. However, the Commission concluded that it had not been established by clear, cogent, and convincing evidence that the judge had spoken in a judicial capacity, noting that the judge was not aware that the prosecutor would call him "judge" and that the judge did not directly or indirectly refer to himself as a judge, stating

that he was there “only as a neighbor.” The judge had presented evidence that he attended the proceeding as an attorney for a non-lawyer friend who was posting the bail and requested the judge to address the court on the issue of bail because the friend believed that a non-lawyer could not make such a presentation.

The New York judicial ethics committee advised a part-time judge to stay away from any courtroom within the same county whenever a client of the judge’s firm is a party and attorneys from the firm are appearing to represent that party because the judge’s mere presence in the courtroom may give rise to an appearance of impropriety (*New York Advisory Opinion 89-1*; *New York Advisory Opinion 89-12*).

### ***Using the prestige of office to advance the judge’s law practice***

The prohibition on a judge lending “the prestige of judicial office to advance the private interests of the judge or others” means that the letterhead of a law firm with which a part-time judge is affiliated may not in any way refer to the judge’s judicial position, although the judge’s name may appear (*New York Advisory Opinion 89-12*). See also *South Carolina Advisory Opinion 6-1987* (the name of a retired judge subject to recall may not appear in a law

firm’s letterhead as “Retired (name of court) Judge”); *Texas Advisory Opinion 155* (1993) (a retired judge who may practice law but not appear in court may not use the title “judge” on letterhead, in directories, or in any other public way).

Moreover, although a part-time judge may mail out announcements about the opening of a private law practice or advertise the practice in a newspaper, the announcements should not disclose or allude to his or her identity as a judge or use the judge’s judicial title (*South Carolina Advisory Opinion 1-1998*). Similarly, a newly elected part-time judge should not mail announcements to clients of the judge’s law firm informing them of the judge’s election to judicial office, nor should the judge permit the law firm to mail announcements (*New York Advisory Opinion 97-61*). Furthermore, a part-time judge may not place an advertisement for the judge’s law practice in a newspaper if the ad contains the judge’s title (*New York Advisory Opinion 92-125*). Finally, a part-time judge’s private law office telephone may not be answered, “Judge X’s office.” *South Carolina Advisory Opinion 8-1983*; *ABA Advisory Opinion 1473* (1981). See also *Ohio State Bar Association v. Dye*, 572 N.E.2d 666 (Ohio 1991) (former part-time lawyer judge reprimanded for, among other misconduct, using the county court-

room as his private legal office for 25 years; the judge had resigned after the charges were filed); *ABA Formal Opinion 95-391* (a former judge who has returned to the practice of law may not

continue to use the titles “Judge” or “The Honorable” or encourage others to refer to him as “Judge X” or “Your Honor” in the courtroom or otherwise in connection with legal proceedings).



**Have you ever been referred to as “Judge” or “Your Honor” in court when you were appearing as an attorney? What did you do? What steps have you taken or could you take to prevent that from happening? Have you instructed the staff and other attorneys at your law office to refrain from using your title in the practice? What instructions did you give? How were these given (in other words, are there written guidelines)?**

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## Notes

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# Checklist

## ***Misuse of office***

- Could the request I am contemplating making to a judge, court personnel, prosecutor, or law enforcement officer create in reasonable minds a perception that I am attempting to use the prestige of my part-time judicial office to advance private interests? [See page 17]
- When I appear in court, how can I clearly identify my representative role rather than non-judicial role? [See page 18]
- Does the letterhead of my law firm refer to my judicial position? [See page 19]
- Do any announcements or advertisements from my practice disclose or allude to my identity as a judge or use my judicial title? [See page 19]
- Have my law office personnel been instructed not to answer the phone using my judicial title or otherwise refer to my title? [See page 19]





# WHEN A PART-TIME JUDGE'S LAW PRACTICE REQUIRES DISQUALIFICATION

Part-time lawyer judges, like full-time judges, are required to comply with the disqualification rules in Canon 3 of the code of judicial conduct. Simultaneously practicing law and presiding as a judge, however, will present situations for a part-time lawyer judge that would not be faced by a full-time judge prohibited from practicing law. For example, a part-time lawyer judge may discover that one of the parties in a case in which he or she is scheduled to preside is a client or that one of the attorneys is someone with whom the judge practices law.

The disqualification rules in the code do not specifically address these and other unique issues that part-time lawyer judges may face. Therefore, whether disqualification is required for a part-time judge in a particular situation must be analyzed using the code's catch-all provision requiring disqualification whenever "the judge's impartiality might reasonably be questioned"

(Canon 3E(1)). In some states, disqualification rules are found in court rules or statutes rather than the code of judicial conduct, but the substance is identical or similar to that of the model code.

Using this analysis, judicial ethics advisory committees have established specific disqualification rules for situations that part-time lawyer judges frequently face. This section discusses whether a part-time lawyer judge should disqualify from cases in which:

- *A current client is a party.*
- *A current client is a witness or otherwise involved in the case.*
- *A government entity that is currently the judge's client is a party or otherwise involved.*
- *A former client is a party or otherwise involved.*



**What is the citation to your state's version of Canon 3E(1)?**

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- *One of the litigants is an adverse party to a client the judge is representing in an unrelated matter.*
- *One of the attorneys is formally associated with the part-time judge in the practice of law.*
- *One of the attorneys shares office space with the judge, has a fee sharing agreement with the judge, is co-counsel in cases with the judge, or is employed on the staff of the same government agency or public defender office as the judge.*
- *One of the attorneys is opposing counsel to the judge in an unrelated matter.*

This section also discusses under what circumstances remittal or waiver of disqualification is allowed.

## **CASES INVOLVING CURRENT CLIENTS**

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### ***Cases in which current clients are parties***

A part-time lawyer judge may not preside over a case in which a current client of the judge or the judge's law firm is a party or criminal defendant. *Alabama Advisory Opinion 97-631*; *New York Advisory Opinion 95-5*; *Pennsylvania Advisory Opinion 12*

(1974); *Texas Advisory Opinion 173* (1994). The judge may not take any action in a case involving a client even if the judge has never represented the client with respect to the matter and the client is represented by a different attorney or firm in the case before the judge.

Failure to disqualify when a client appears has resulted in discipline for part-time lawyer judges. For example, the Texas State Commission on Judicial Conduct publicly reprimanded a part-time judge for presiding over a small claims case while the judge was representing the plaintiff in an unrelated, pending case. *Public Reprimand of Bronson* (Texas State Commission on Judicial Conduct January 19, 1995). The Commission noted that the judge knew that the plaintiff was his client but did not recuse or disclose the relationship to the defendant. The Commission explained:

It is axiomatic that an attorney is an advocate, whose primary duty is to advance and protect his client's interests. In contrast, a judge's primary duty is to serve as a neutral and disinterested referee and to render a fair and impartial ruling. For a judge in an active and ongoing attorney-client relationship to preside over and decide a case involving his client brings these two duties into irreconcilable conflict.

See also *In the Matter of Feeney*, Determination (New York Commission on Judicial Conduct December 24, 1987) (public censure for, among other misconduct, failing to disqualify from a case in which a client was the defendant); *In the Matter of Bruhn*, Determination (New York Commission on Judicial Conduct December 24, 1987)

(public censure for, among other misconduct, taking action in the cases of three clients of his law firm, including final disposition in two cases); *In re Zafiratos*, 486 P.2d 550 (Oregon 1971) (public reprimand for, among other misconduct, presiding over traffic charges against a client he was representing on unrelated criminal charges).



**How often would you estimate you have disqualified yourself because a current client has appeared in a case?**

**A client has never appeared in a case** \_\_\_\_\_

**Once a week** \_\_\_\_\_

**Once a month** \_\_\_\_\_

**Once a year** \_\_\_\_\_

**If you practice with other attorneys, how do you keep informed of who their clients are and what cases their clients may have pending in your court? Describe any procedure you currently use or could adopt that would ensure that you never inadvertently preside in a case involving a client of yourself or your law firm.**

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## ***Government clients***

Disqualification may be required if a client that is a government entity is a party in a case or a case involves an employee (in his or her official capacity), agency, or subdivision of the judge's governmental client.

- A part-time judge who also serves as a city attorney representing the city in civil cases may not preside over any matters involving the municipality or members of its police department. *Washington Advisory Opinion 96-8*.
- An assistant attorney general or assistant county attorney, both employees or counsel for state government, cannot act as a judge pro tempore in any matter in which the state or any of its political subdivisions or agencies is a party. *Arizona Advisory Opinion 95-8*.
- A part-time judge who has been retained as independent counsel by a city is required to disqualify in matters involving the city. *New York Advisory Opinion 96-3*.

However, the Michigan advisory committee suggested that a part-time lawyer judge who represents the government unit that funds his or her court might not be disqualified from cases involving that client if the judge's repre-

sentation was isolated and in a single civil cause of action over which the judge had no adjudicative jurisdiction (*Michigan Advisory Opinion JI-97* (1994)). Moreover, the New Hampshire Supreme Court stated that a part-time judge who serves as a town's lawyer is not disqualified from cases involving the town unless the case directly calls into question the judge's advice to the town or the ruling in the case could directly affect the interests of the town (*Petition of the New Hampshire Judges Association*, 490 A.2d 1374 (New Hampshire 1985)). See discussion of part-time judges acting as counsel for government entities at page 82, *infra*.

## ***Cases in which current clients are witnesses or otherwise involved***

A part-time lawyer judge is also disqualified from a case in which a current client appears even if the client's involvement is not as a party to the suit. For example, a judge is disqualified from a case if the client appears as a witness or if the client, a police officer, appears as the arresting officer (*New York Advisory Opinion 94-71*).

The New York judicial ethics committee has noted that:

Some judges who also practice law have found it helpful, at the opening of a court session, to ask

whether any person having business before the court on that day or evening has any relationship to the judge or the judge's law firm; however, this procedure may or may not be practical in a particular judge's situation.

*New York Advisory Opinion 88-17(c) and 88-48.*

### **CASES INVOLVING FORMER CLIENTS**

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Disqualification may also be required from cases in which someone the part-time lawyer judge used to represent is a party, criminal defendant, attorney, witness, or complaining witness; it is not necessary in all cases but depends on an evaluation of several factors that may affect the judge's impartiality. Full-

time judges can also face this issue, and, generally, the same factors a full-time judge would have to consider if a former client appears in a case are relevant to the question whether a part-time judge should disqualify. See Gray, *Ethical Issues for New Judges* (AJS 1999). However, the problem is greater for judges simultaneously practicing law "because it may be unclear whether or when any attorney-client relationship with a party may have come to an end" (*In the Matter of Edwards*, 694 N.E.2d 701 (Indiana 1998)). Therefore, a part-time judge must at least disclose that a former client is involved in a case.

The primary considerations in determining whether disqualification is required in cases involving former clients are the extent to which the prior



**Have you ever made an opening announcement like that suggested by the New York opinion? Do you think such an announcement would be a pragmatic or effective practice for you? Why or why not? What do you think would be the best wording for such an announcement?**

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representation might in some limited way be related to the current case; the length of time between the prior representation and the appearance of the former client before the judge; and the nature of the prior representation. *In the Matter of Edwards*, 694 N.E.2d 701 (Indiana 1998); *New York Advisory Opinion 88-17(c) and 88-48*.

Whether the nature of the prior representation requires disqualification depends on factors such as:

- the number of times the judge represented the former client;
- the amount of work the judge performed for the client;
- the amount of the fee;
- whether the representation was routine or technical or involved the morality of the client's conduct;

- the duration of the attorney-client relationship;
- whether there is a social relationship between the judge and the former client; and
- whether special circumstances create a likely appearance of impropriety.

In *Edwards*, the court found that the judge was not obligated to disqualify himself because three years had passed since the attorney-client relationship had ended and the case was wholly unrelated to the previous representation.

The New York advisory committee has adopted a rule that requires a part-time judge to disqualify from cases involving a former client if the last representation of the client occurred within two years. *New York Advisory Opinion 88-17(c) and 88-48*; *New York*



**Have you ever disqualified yourself from a case involving a former client? What factors did you consider required disqualification?**

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*Advisory Opinion 89-13; New York Advisory Opinion 89-88; New York Advisory Opinion 92-1; New York Advisory Opinion 92-14; New York Advisory Opinion 94-71; New York Advisory Opinion 95-5.* Under this rule, if more than two years has elapsed, the judge should still disclose the prior relationship on the record, but, according to the advisory opinions, whether disqualification is necessary depends on consideration of the circumstances listed above.

Moreover, the New York Commission on Judicial Conduct's conclusion that a judge should not take action in a case involving a former client did not specify a time limit after which the prohibition would no longer apply (*In the Matter of Bruhn*, Determination (New York Commission on Judicial Conduct December 24, 1987)). In

*Bruhn*, a part-time lawyer judge was publicly censured for, among other misconduct, taking action in the cases of two former clients of his law firm. Although in one of the cases the part-time judge's law firm had represented the defendant in a criminal case "on another charge earlier the same year," in the second case, the Commission simply noted that the defendant was "a former client of his law firm" without indicating when the former representation had taken place. *See also In the Matter of Filipowicz*, 388 N.Y.S.2d 920 (New York Supreme Court Appellate Division 1976) (disapproving of the "apparently prevailing practice [in small communities] in which [part-time judges] sit in judgement in cases in which they formerly had an attorney-client relationship with the litigant" without indicating any time limit);



**Have you ever presided in a case involving a former client? If yes, what factors did you consider made disqualification unnecessary? Did you disclose the prior relationship?**

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*New York Advisory Opinion 95-5* (stating a judge may not arraign former clients, without indicating any time limit).

A two-year rule for disqualification has also been suggested by the New York advisory committee if a former client is an attorney in a case (*New York Advisory Opinion 89-13*) or if a former client who is a police officer appears in the judge's court to request the judge to sign warrants of arrest or as a witness in a case (*New York Advisory Opinion 89-88*). The New York Commission disciplined a part-time lawyer judge for conducting an arraignment where the complaining witness had been a client of the judge between six months and one year earlier (*In the*

*Matter of Romano*, Determination (New York State Commission on Judicial Conduct August 7, 1998) (removal for this and other misconduct), *accepted*, 93 N.Y.2d 161 (New York 1999)).

If a former client appears as a witness in a case with a jury trial, the New York advisory committee stated that the part-time judge may preside (*New York Advisory Opinion 92-14*). If it is a non-jury case and the judge knows of the witness's appearance in advance, the judge should offer to disqualify; if it is a non-jury case and the judge did not know in advance that the former client would testify, the judge must disclose the relationship but may continue to sit (*New York Advisory Opinion 92-14*).



**Do you think the New York rule requiring a part-time judge to disqualify from cases involving a former client if the last representation of the client occurred within two years is a good one to adopt? Why or why not? Draft a rule that could be added to the code to expressly address this situation.**

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## ***CASES INVOLVING A CLIENT'S ADVERSARY***

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A part-time judge may not preside over a proceeding in which one of the litigants is an adverse party in other pending matters being handled by the judge in the judge's law practice. *Arizona Advisory Opinion 93-3*; *South Carolina Advisory Opinion 8-1992*. The Arizona judicial ethics committee addressed whether a pro tem appellate judge could hear an appeal involving the Federal Deposit Insurance Corporation where the judge as a lawyer had several pending matters in litigation against the FDIC or represented a client with interests adverse to the FDIC in negotiations with the FDIC. The committee concluded that the judge could not sit in the appeal because "[c]learly, the pro Tem judge's impartiality might reasonably be questioned."

The South Carolina advisory committee addressed an inquiry from a part-time magistrate who served as co-counsel to a Native American tribe in pending and past lawsuits and settlement negotiations involving their claim to land against approximately 60,000 defendants. The committee concluded that the magistrate had to recuse from cases involving those defendants. The committee reasoned that given the magistrate's current and former repre-

sentation of the tribe, it was reasonable to argue that the magistrate may have acquired a prejudice against defendants the tribe sues and to question the magistrate's impartiality in any case involving a defendant in their suits. The committee advised that "[b]ased on these inherent conflicts and the frequency with which they are certain to arise with 60,000 defendants, the magistrate might be advised to choose between his judicial position and his private law practice because frequent recusals would interfere with his authority to dispose promptly of the business of the court."

## ***CASES INVOLVING ATTORNEYS WITH WHOM A PART-TIME JUDGE IS AFFILIATED***

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### ***Formal associations***

A part-time lawyer judge must recuse from cases in which one of the parties is represented by the judge's law firm or by an attorney who is associated with the judge in the practice of law. This rule applies to cases involving partners, associates, contractors, and employees of the part-time lawyer judge and members, partners, shareholders, associates, and attorneys who are "of counsel" to a law firm with which the part-time lawyer judge is affiliated in any respect



**Have you ever disqualified yourself from a case because one of the parties is the adversary of a client in a pending, unrelated case you are handling? Do you agree that there is a reasonable basis to question the impartiality of a part-time judge when one of the parties in a case is the adversary of a client of the judge? Why or why not?**

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including as an employee, partner, member, shareholder, or of counsel.

☉ *Mark with a check any opinions from your state.*

- A part-time judge's law partners may not practice before the judge. *Alabama Advisory Opinion 80-67.*
- A city attorney who has formed a partnership with a part-time judge may not prosecute cases before the judge. *Alabama Advisory Opinion 96-593.*
- A part-time judge may not preside in cases in which an associate in the

judge's law firm appears. *Georgia Advisory Opinion 187 (1993).*

- A part-time judge may not preside in a case in which the judge's law associate who shares office expenses appears. *Louisiana Advisory Opinion 46 (1979).*
- A member of the law firm to which a part-time judge is "of counsel" may not appear before the judge. *Michigan Advisory Opinion JI-114 (1997).*
- A part-time magistrate may not preside over matters in which a member of the magistrate's law firm appears. *Michigan Advisory Opinion JI-97 (1994).*

- A part-time judge may not hear matters presented by the judge's law firm. *Michigan Advisory Opinion RI-1* (1989).
- A part-time judge may not preside in cases in which the firm that employs the judge as a lawyer appears as counsel. *New Mexico Advisory Opinion* 86-7.
- A judicial hearing officer may not preside over a matter in which any party or witness is represented by an attorney who is a partner or associate in a law firm or of counsel to a law firm with which the judicial hearing officer is affiliated in any respect. *New York Advisory Opinion* 89-80.
- A part-time judge must disqualify from cases in which one of the attorneys is the judge's associate, a shareholder with the judge in a legal professional association, or an employee, sub-contractor, or independent contractor of the judge. *Ohio Advisory Opinion* 87-29.
- The law partners or associates of a part-time magistrate may not appear before the magistrate. *Ohio Advisory Opinion* 98-3.
- A part-time judge must recuse from cases involving partners. *South Carolina Advisory Opinion* 27-1994.
- A part-time judge may not preside over cases that are prosecuted by the judge's law partner. *South Carolina Advisory Opinion* 36-1996.
- A part-time judge must recuse from any case where the judge's law firm represents one of the parties. *Washington Advisory Opinion* 90-17.
- A part-time judge may not preside over cases in which the judge's law partner appears. *West Virginia Advisory Opinion* (June 16, 1993).  

In *In the Matter of McInnis*, 258 S.E.2d 91 (South Carolina 1979), a part-time lawyer judge was publicly reprimanded, in part, for allowing his law partners to practice before him. In four cases, charges of driving under the influence or similar charges were reduced to either reckless driving or littering by the judge or the arresting officer. In each of the cases, another member of the judge's firm had contact with the defendant or the arresting officer, and in one case, the firm billed the defendant for a \$300 fee. The court held that "it is improper, amounting to misconduct, for a partner of a part-time judge to practice before the judge, with or without compensation and to use his influence to have a charge reduced or dismissed."

If the part-time lawyer judge's partner appears before the judge's court as a





**How many times have you disqualified yourself from a case because an attorney with whom you were formally associated appeared?**

**Never** \_\_\_\_\_

**Once a week** \_\_\_\_\_

**Once a month** \_\_\_\_\_

**Once a year** \_\_\_\_\_

**List the attorneys whose presence in a case would require you to disqualify under this rule.**

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**If you practice with other attorneys, how do you keep informed of what cases they may have pending in your court? Describe any procedure you currently use or could adopt that would ensure that you are not inadvertently assigned to a case involving an attorney with whom you are formally associated.**

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prosecutor, the rule also applies and requires disqualification. *See Alabama Advisory Opinion 96-593; South Carolina Advisory Opinion 36-1996; West Virginia Advisory Opinion* (June 16, 1993). The Alabama committee stated that the disqualification applies to any case in which the partner participated as prosecutor either directly or indirectly (*Alabama Advisory Opinion 96-593*), while the West Virginia committee stated that it applies only to cases in which the partner was personally involved (*West Virginia Advisory Opinion* (November 16, 1998)).

Disqualification is also required if a witness in a case is represented by an attorney with whom the judge is associated (*New York Advisory Opinion 89-80*). Finally, a part-time judge who is a partner in a law firm should not preside over matters handled by a former associate of that firm for two years running from the date the former associate leaves the firm's employment (*New York Advisory Opinion 91-143*).

### ***Other affiliations***

A part-time lawyer judge may be disqualified from a case involving an attorney with whom the judge is associated in the practice of law even in the absence of a formal partnership, employment, or "of counsel" arrangement. For example, a part-time judge is dis-

qualified from cases in which an attorney appears if the judge shares office space with the attorney; has a fee sharing agreement with the attorney; is co-counsel to the attorney in cases; or is a member of the staff of a government agency or the public defender with the part-time judge.

● *Mark with a check any opinions from your state.*

### **Sharing an office**

If a part-time lawyer judge shares office space and related amenities with an attorney appearing in a case, the judge is disqualified even if there is no more formal affiliation between them. The New York State Commission on Judicial Conduct determined that removal was the appropriate sanction for a part-time town court judge who, among other misconduct, presided over six cases involving an attorney with whom he shared office space. *In the Matter of Assini*, Determination (New York Commission on Judicial Conduct March 4, 1999). (The judge has asked the Court of Appeals to review the Commission's determination; the court's opinion had not been issued at the time of publication of this *Guide*. For additional discussion of this case, *see* page 88, *infra*.)

The judge paid no rent for the office space, but he occasionally appeared for

the attorney, Lawrence Long, occasionally as an accommodation for court appearances and real estate closings. The judge's name appeared below Long's on the office door; the judge's professional stationery listed Long's address and telephone number; the judge received mail and telephone calls at the office; Long's secretary took phone messages for the judge and did typing for him occasionally; the judge had used the office to meet clients and to conduct closings.

The judge did not disclose on the record that he shared office space with Long, nor did he ask whether there were objections to his presiding. The judge also permitted Long to appear before other judges of the court. Concluding that it was improper for the judge to permit Long to appear before him or other judges of his court, the Commission found that, although they were not partners or associates in the practice of law in the usual sense, the judge and Long held themselves out to the public as affiliated in some way. The Commission stated that it would be reasonable for members of the public to presume that they could curry special favor from the judge by retaining Long or, conversely, for adversaries of Long to doubt the judge's fairness in their cases.

Similarly, the Kentucky judicial ethics committee reasoned that "the general public cannot be expected to

comprehend the difference between sharing office space and being together in a firm" (*Kentucky Advisory Opinion JE-76*). Therefore, the committee advised that a part-time judge is disqualified from a case in which an attorney with whom the judge shares office space, a secretary, and a library appears.

However, the Kentucky committee stated that the necessity for disqualification would be removed if the office was redesigned so that the part-time lawyer judge and the attorney had separate receptionists, separate waiting rooms, and separate secretaries. Similarly, the Kansas judicial ethics committee stated that a part-time judge may hear cases involving a lawyer who shares a waiting room and hallway with the judge if the judge and the lawyer have separate offices, secretarial staff, telephone lines, and letterhead (*Kansas Advisory Opinion JE-86* (1999)). The committee noted that the part-time judge and the attorney did not represent themselves as partners or share any economic benefit from each other's business.

Moreover, the Kentucky judicial ethics committee advised that the judicial deputies of a part-time judge may hear cases involving an attorney with whom the judge shares office space (*Kentucky Advisory Opinion JE-76*). The New York advisory committee stated that a part-time judge who shares

office space with a part-time public defender, but has no formal practice association with him or her, may preside over matters that are handled by other members of the public defender's office (*New York Advisory Opinion 90-43*). Cf., *Arkansas Advisory Opinion 98-7* (a part-time judge may not hear

cases presented by the assistant of an attorney whom the judge pays for helping him with his private practice or with whom the judge shares an office).

### **Fee splitting**

A part-time judge was publicly censured for presiding in numerous criminal cases in which two attorneys with



**Have you ever disqualified yourself from a case because you share office space with one of the attorneys? If yes, approximately how many times? Do you agree that there is a reasonable basis for questioning the impartiality of a part-time judge when he or she shares office space with one of the attorneys in a case? Why or why not?**

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**Other than attorneys with whom you are formally associated, list any attorneys whose cases you should not hear because you share office space with them.**

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whom the judge was associated in the judge's law practice represented one of the parties. *In re Lemoine*, 686 So. 2d 837 (Louisiana), *on rehearing*, 692 So. 2d 358 (1997). With respect to one of the attorneys (Van Dyke), the association included splitting attorneys fees in 21 cases in which they shared represen-

tation or the judge had referred to Van Dyke. The judge also owned a building with Van Dyke in which they both had offices, and a sign on the building read "Lemoine-Van Dyke Law Center." With respect to the second attorney (Brewer), the association consisted of the judge receiving a share of the fees Brewer



**Have you every disqualified yourself from a case because you have a fee splitting agreement with one of the attorneys? Approximately how many times? Do you agree that there is a reasonable basis for questioning the impartiality of a part-time judge who has a fee splitting agreement with one of the attorneys in a case? Why or why not?**

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**Other than attorneys with whom you are formally associated, list any attorneys whose cases you should not hear because you have a fee splitting agreement with them.**

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earned in lieu of rent for office space pursuant to a reciprocal fee arrangement.

The judge presided over 20 criminal cases in which one of the litigants was represented by either Van Dyke or Brewer. The judge did not advise the litigants of his relationships with Van Dyke and Brewer and recused himself in only one case. None of those cases, however, was one in which the judge shared fees with the attorney. The court found that the judge was clearly associated in the practice of law with Van Dyke and Brewer, requiring disqualification in the cases in which they appeared. *See* further discussion of case at pages 103-04, *infra*.

### **Government agency or public defender staff**

A part-time judge who also works on the staff of a government or public defender office is disqualified from a proceeding that will be tried by another member of the staff. For example, the Alabama committee advised that a part-time judge who also serves as a part-time assistant district attorney should disqualify from a proceeding that will be tried by a member of the district attorney's staff (*Alabama Advisory Opinion 87-311*). The committee reasoned that the judge's close association with the prosecutor might cause a

reasonable person to see the judge as both judge and prosecutor.

Similarly, the New York judicial ethics committee stated that a part-time justice who is also a county attorney, an assistant county attorney, or a social services attorney must disqualify from cases handled by members of the county attorney's or social services department's staff. *New York Advisory 88-46; New York Advisory Opinion 91-144*. The New York committee also stated that a part-time judge who serves as a public defender may not preside over any matters handled by other attorneys from the public defender's office. *New York Advisory Opinion 90-143; New York Advisory Opinion 95-81*. *Cf.*, *New York Advisory Opinion 89-9* (a part-time judge who works in a law firm with a part-time city attorney need not recuse from cases where other city attorneys appear because the association is too remote).

### **Co-counsel**

If a part-time judge is co-counsel to another attorney in a case, that relationship requires disqualification if the co-counsel appears in the judge's court on an unrelated case (*Ohio Advisory Opinion 91-20*). The Ohio advisory committee explained:

When attorneys co-counsel on cases and divide fees..., even though they are not partners or





**Have you ever disqualified yourself from a case because you are on the same agency staff as one of the attorneys? If yes, approximately how many times? Do you agree that there is a reasonable basis for questioning the impartiality of a part-time judge when he or she is on the staff of the same agency as one of the attorneys in a case? Why or why not?**

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**List any attorneys, other than those with whom you are formally associated, whose cases you should not hear because you are on the staff of the same agency as they are.**

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associates in a firm, there is a professional relationship which could give an appearance of impartiality if one of the attorneys appears before the other in his/her role as referee.... Potential conflicts abound because of the personal,

professional, and financial aspects of the relationship.

*Ohio Advisory Opinion 91-20.*<sup>3</sup> Disqualification is required while the case in which the judge is co-counsel is still

<sup>3</sup> The Ohio Supreme Court adopted a new code of judicial conduct after 1991, so the status of *Ohio Advisory Opinion 91-20* is listed as “not current.” However, the provision interpreted by that opinion—the requirement that a judge is disqualified whenever the “judge’s impartiality might reasonably be questioned”—was not changed by the new code.



**Have you ever disqualified yourself from a case because you are co-counsel with one of the attorneys in another case? If yes, approximately how many times? Do you agree that there is a reasonable basis for questioning the impartiality of a part-time judge when he or she is co-counsel with one of the attorneys in a case? Why or why not?**

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**List any attorneys, other than those with whom you are formally associated, whose cases you should not hear because you are co-counsel with them.**

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pending, or until the fees have been received, if the case has been completed.

The rule also applies to a law partner or associate of the judge's co-counsel and an attorney who shares office space with the judge's co-counsel if that attorney has access to confidences and

secrets through the co-counsel's files or if that attorney has any involvement, relationship, or responsibility with the case in which the judge is co-counsel. However, disqualification is not required when an attorney who shares office space with the judge's co-counsel appears before the judge if that attorney

does not have access to confidences and secrets through the co-counsel's files and has no involvement, relationship, or responsibility with the case in which the judge is co-counsel.

### ***CASES INVOLVING A PART-TIME JUDGE'S COURTROOM ADVERSARY***

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A part-time lawyer judge is not required to disqualify from cases in which one of the attorneys is opposing counsel to the judge in an unrelated action in another court. *Georgia Advisory Opinion 142* (1989) (attorney is opposing counsel in two cases); *New York Advisory Opinion 92-40*. The New York judicial ethics committee stated that such a situation presents "no reasonable basis" to question the impartiality of the part-time judge. However, if the adversarial relationship in the case has produced a bias or prejudice or if there



**Have you ever disqualified yourself because the opposing counsel in a case you are handling as a lawyer appears in an unrelated case before you as a judge? Do you agree that there is no reasonable basis for questioning the impartiality of a part-time judge when the opposing counsel in a case the judge is handling as a lawyer appears in the judge's court? Why or why not?**

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are other related circumstances that raise reasonable questions about the judge's impartiality, disqualification is necessary.

## ***REMITTAL***

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Under Canon 3F of the 1990 model code, a judge who is disqualified because his or her impartiality might reasonably be questioned or for one of the specific grounds enumerated in the code may still hear a case if the disqualification is remitted, in other words, waived by the parties. (If a judge is disqualified because of a personal bias or prejudice concerning a party, remittal is not allowed.)

Remittal is allowed if the judge discloses on the record the basis of the judge's disqualification; the judge asks the parties and their lawyers to consider whether to waive disqualification; the parties and their lawyers consider waiver out of the presence of the judge; the parties and the lawyers, without participation by the judge, agree that

the judge should not be disqualified, and the judge is willing to participate. The waiver agreement must be incorporated in the record of the proceeding.

The 1972 model code had stricter requirements for remittal or waiver, and those provisions are still in effect in many states. Under the 1972 model code, disqualification could be waived only if the grounds for disqualification were a judge's financial interest in a case, the financial interest of the judge's spouse or minor child living in the judge's home, or a relative's involvement in a case as a party, witness, or attorney.

Moreover, under the 1972 model code, a judge could not ask the parties to waive the disqualification but could preside only if the parties and lawyers, independently of the judge's participation, all agreed in writing that the judge's relationship was immaterial or that his financial interest was insubstantial. The 1972 code required that the agreement be signed by all the parties and lawyers as well as incorporated in the record.



## Notes

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**What grounds for disqualification does your state allow to be remitted? Under your state's provision for waiver or remittal, may you ask the parties to waive or remit the disqualification?**

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**Have you ever had your disqualification because of your attorney/client relationship with a party in a case remitted? How did that come about?**

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**Have you ever had your disqualification because of your association with an attorney in a case remitted? How did that come about?**

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# Checklist

## ***Disqualification***

*Before presiding in a case, a part-time lawyer judge should ask the following questions to determine if disqualification is required because his or her “impartiality might reasonably be questioned.”*

### **Questions about parties, witnesses, and others involved in a case**

- Do I currently represent one of the parties (or the defendant if it is a criminal case)? (See page 24).
- Does my firm currently represent one of the parties (or the defendant if it is a criminal case)? (See page 24).
- Do I currently represent one of the witnesses or anyone else involved in the case? (See page 26).
- Is one of the parties an adverse party in a matter I am handling for a client? (See page 31).
- Does this case involve a former client? (See page 27).

If so,

- How long ago did my representation end?
- Did my representation of the client involve a lot of work over a long period of time?
- Did my representation generate a large fee?
- Did I represent the client in more than one matter?
- Did I represent the client in a complicated case and/or on serious criminal charges?
- Did I represent the client in a case similar to the matter on which he or she is now appearing in my court?
- Did the representation result in the formation of a social relationship with the client?
- Have I disclosed that a former client is involved in a case?

***(continued)***

### **Questions about attorneys appearing in a case**

- Is one of the attorneys my partner, associate, contractor, or employee? (See page 31).
- Is one of the attorneys a member, partner, shareholder, associate, or of counsel to a law firm with which I am affiliated as an employee, partner, member, shareholder, of counsel, or in any other respect? (See page 31).
- Do I share office space with one of the attorneys? (See page 35).
- Do I have a fee sharing agreement with one of the attorneys? (See page 37).
- Am I co-counsel to one of the attorneys in other cases? (See page 39).
- Am I on the staff of the same government agency or public defender's office as one of the attorneys? (See page 39).
- Have I formed a bias or prejudice against one of the attorneys as the result of being opposing counsel in an unrelated action or other related circumstances that raise reasonable questions about my impartiality? (See page 42).



# HOW BEING A PART-TIME JUDGE AFFECTS A LAWYER'S PRACTICE

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Continuing part-time judges, periodic part-time judges, and pro tempore part-time judges are exempt from Canon 4G and, therefore, are permitted to practice law. However, a part-time judge who is also a part-time lawyer is “in a position of great delicacy where he must be scrupulously careful to avoid conduct in his practice where he utilizes or seems to utilize his judicial position to further his professional success.” *In the Matter of Friday*, 208 S.E.2d 535 (South Carolina 1974). Part-time lawyer judges have been cautioned to exercise “extra care and effort...so as not to create the appearance of impropriety” (*Arkansas Advisory Opinion 97-4*) and that “license must yield to ethic” (*Arkansas Advisory Opinion 98-2*).

To assist part-time judges to scrupulously keep their law practices separate from their judicial duties, the application section of the code imposes express limitations on the cases a part-time judge can take as a lawyer and the courts in which the judge may practice. This section discusses the model code’s limitations on a part-time judge:

- *Acting as a lawyer in a proceeding in which the judge has served as a judge*

*or in any other proceeding related thereto* (Application section, ¶¶ C(2), D(2), and E(2)).

- *Practicing “law in the court on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves”* (Application section, ¶¶ C(2) and D(2)).

Moreover, other limitations on a part-time judge’s practice, for example, whether a part-time judge may be a prosecutor or defense attorney, have been inferred from the general provisions of the code that apply to part-time as well as full-time judges. Those provisions include the requirement that a judge “shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary” (Canon 2A); the prohibition on a judge “lend[ing] the prestige of judicial office to advance the private interests of the judge” (Canon 2B); and the requirement that the “judicial duties of a judge take precedence over all the judge’s other activities” (Canon 3A). This section will discuss whether, in light of

these restrictions, a part-time judge may:

- *Act as a defense attorney in criminal cases.*
- *Receive fees from the government for representation of indigent criminal defendants.*
- *Serve as a prosecutor.*
- *Represent a government entity.*
- *Represent a client whose adversary in the case is a government entity.*
- *Represent other clients who frequently are in court.*

## ***ACTING AS JUDGE AND ATTORNEY IN THE SAME PROCEEDING***

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### ***In general***

As one of the express limits on the cases a part-time lawyer judge may handle as a lawyer, the code provides:

[A part-time judge] shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.

Application section, ¶¶ C(2), D(2), and E(2). The 1972 model code also contained that rule.<sup>4</sup>

Note that the lawyer disqualification created by paragraphs C(2), D(2), and E(2) applies whenever a part-time judge “has served as a judge,” without any exemption for participation that might be characterized as insignificant or administrative. It is, therefore, broader than the rule for former judges (found in Rule 1.12(a) of the Model Rules for Professional Responsibility) that disqualifies former judges from acting as lawyers only in matters “in which the lawyer participated personally and substantially as a judge....”

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<sup>4</sup> Georgia by statute has a broader rule that disqualifies a part-time judge from acting as an attorney in any case over which the judge’s court has pending jurisdiction or has exercised jurisdiction. See *Georgia Advisory Opinion 48* (1982); *Georgia Advisory Opinion 87* (1986).

New York also by statute has a broader rule that prohibits a judge from practicing law “in an action, claim, matter, motion or proceeding originating in [his or her] court.” The term “originating” has been defined so that the rule bars a judge from appearing as an attorney in any claim or charge initiated in the judge’s court, whether or not the judge took any action on it. *In the Matter of Feeney, Determination* (New York State Commission on Judicial Conduct December 24, 1987).



**Does your state have a restriction, like that in the 1990 model code, that prevents you from acting as a lawyer in a proceeding in which you served as a judge or in any related proceeding? What is the citation for that provision? Is it identical to the model code version? If not, how is it different?**

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**Waiver**

The prohibition on acting as judge and attorney in the same proceeding applies to continuing, periodic, and pro tempore part-time judges. For continuing and periodic part-time judges, there is no provision for waiver by the parties in the proceeding that would allow a part-time judge to act as a lawyer in a case in which he or she served as a judge.

However, under paragraph E(2) of the Application section of the code, a **pro tempore part-time judge** may act as a lawyer in a proceeding in which the judge served as a judge or a related proceeding if he or she discloses the

judicial service, and obtains the consent of all the parties. Paragraph E(2) states:

A person who has been a pro tempore part-time judge shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto except as otherwise permitted by Rule 1.12(a) of the ABA Model Rules of Professional Conduct.

In turn, Rule 1.12(a) provides:

A lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer,...unless all parties to the proceeding consent after disclosure.

## *Interpreting the rule*

Under paragraphs C(2), D(2), and E(2), if a part-time lawyer judge served as a judge at any stage in a proceeding, he or she cannot act as a lawyer at any subsequent stage in the same proceeding. For example, part-time lawyer judges have been disciplined or their decisions have been overturned for acting as defense attorneys in cases in which they had earlier issued a warrant or set bail.

- If a part-time lawyer judge sets bail while acting as judge, he or she may not attempt as an attorney to have the bail reduced. *Mississippi Commission on Judicial Performance v. Atkinson*, 645 So. 2d 1331 (1994) (public reprimand for filing a petition for bond reduction before another judge after setting bail as a judge).
- If a part-time lawyer judge issued an arrest warrant and/or fixed the amount of the bond in a case, he or she may not represent the defendant in the case in chief even if the defendant enters a plea of guilty and the judge is not paid a fee. *In the Matter of Friday*, 208 S.E.2d 535 (South Carolina 1974) (conviction overturned).
- If a part-time lawyer judge signs a bench warrant while acting as a judge, he or she may not represent the

defendant arrested pursuant to the warrant. *In re Monson*, No. 93-1568-F-50 (Washington Commission on Judicial Conduct February 3, 1995) (public admonition).

- If a part-time lawyer judge signs a search warrant while acting as a judge, he or she may not represent at trial the defendant whose premises had been searched pursuant to the warrant. *Browning v. State*, 607 So. 2d 339 (Alabama Court of Criminal Appeals 1992) (conviction overturned).
- If a judge issued a warrant for the arrest of a defendant charged with harassment, the judge may not represent the defendant when the case is transferred to a second court. *In the Matter of Bruhn*, Determination (New York Commission on Judicial Conduct December 24, 1987) (censure for this and similar misconduct in several cases).

Rejecting a part-time lawyer judge's argument that the rule was not triggered by ministerial functions such as issuing warrants and setting bonds, the South Carolina Supreme Court concluded that both the determination whether probable cause exists for the issuance of an arrest warrant and the consideration of the circumstances in a particular case to determine the appro-



## ***Related proceedings***

Under paragraphs C(2), D(2), and E(2), a part-time lawyer judge is prohibited from acting as a lawyer not only in the same proceeding in which he or she served as a judge but also in “any other proceeding related thereto.” Whether proceedings are related for purposes of this rule depends on whether they involve the same parties and witnesses and whether they are based on the same underlying events or many of the same facts. Moreover, if issues involved in the proceeding in which the part-time lawyer judge served as a judge are likely to be of significance in the matter in which he or she is contemplating employment as a lawyer, the proceedings are related, and the representation must be declined.

A common application of the “related proceeding” rule of paragraphs C(2), D(2), and E(2) prohibits a judge who presided in a criminal case from representing any party in a civil case arising from the same facts as the criminal case.

- A part-time judge who presided over a traffic case against A may not represent B in a civil action against A for property damage arising out of the collision that was the basis for the traffic charge against A. *In re Zafiratos*, 486 P.2d 550 (Oregon 1971)

(reprimand for this and other misconduct).

- A part-time judge who authorized the arrest of A based on an affidavit filed by B charging battery may not represent B in a claim for damages against A. *Letter from Arkansas Judicial Discipline and Disability Commission to Judge Jerry Patterson* (January 27, 1997) (public admonishment).
- A part-time lawyer judge who presided over a criminal assault case may not act as an attorney in a civil action brought by the victim of the assault against the owner of the premises where the assault occurred based upon an alleged failure to properly supervise and control the premises. *New York Advisory Opinion 94-88*.

Other examples of application of the “related proceedings” disqualification:

- A part-time lawyer judge who determined as a judge that a party had a valid oil lease covering a certain piece of land may not represent that party in an action against a third party to recover oil produced from the land. *ABA Advisory Opinion 49* (1931).
- A part-time juvenile court judge should not represent adults alleged to have been engaged in illegal schemes or acts with a juvenile in the same

transaction involved in a juvenile proceeding before the judge. *Georgia Advisory Opinion 19* (1977).

- A part-time judge who granted a party an order of protection may not represent the party in a divorce action. *New York Advisory Opinion 95-52*. *But see New York Advisory Opinion 95-40* (a part-time judge who performed a marriage ceremony may act as the attorney for one of the parties in a subsequent divorce action based on facts occurring after and unrelated to the marriage ceremony).
- A part-time judge who dismissed a divorce action for improper venue should not accept employment as a lawyer for one of the parties seeking to re-file in the proper county. *Tennessee Advisory Opinion 91-9*.
- A part-time judge who entered a judgement against an individual

should not represent that individual in bankruptcy proceedings. *Tennessee Advisory Opinion 92-3*.

### ***The effect on a part-time lawyer judge's firm***

If a part-time lawyer judge is disqualified from acting as a lawyer in a proceeding due to his or her service as a judge in the same or a related proceeding, other members of the firm are also disqualified. *ABA Advisory Opinion 49* (1931); *Georgia Advisory Opinion 19* (1977); *New York Advisory Opinion 95-52*. Even if "it may be permissible for the judge's law firm...[to represent a party in a related proceeding], the judge may not personally participate in any way in the action or share in the fee that might be earned by the judge's law firm in the matter..." (*New York Advisory Opinion 94-88*).



## Notes

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## **PRACTICING “IN THE COURT ON WHICH THE JUDGE SERVES”**

### ***Continuing and periodic part-time judges***

Under the model code, both **continuing part-time judges** and **periodic part-time judges** are prohibited from practicing “law in the court on which the judge serves....” Application section, ¶¶ C(2) and D(2). For a discussion of the rule regarding pro tempore part-time judges, see page 63, *infra*.

The purpose of the prohibition is to prevent a part-time lawyer judge from having an advantage in cases in which he or she is involved as an attorney or at least from appearing to have an ad-

vantage (*Hawaii Advisory Opinion 3-96*).

If a judicial officer presides in a courtroom as a part-time magistrate or part-time judge and then removes his or her robe to represent clients in that same court the same day, or even the next week or month how will the public perceive our courts? The perception will be mistrust—mistrust of that court and mistrust of the justice system.

*Ohio Advisory Opinion 98-3.*

If a part-time lawyer judge practices in the court on which he or she serves, the part-time lawyer’s status as a judge may have a “chilling effect,” causing attorneys who regularly appear before the judge to treat the part-time judge differently when they are adversaries (*Florida Advisory Opinion 95-8*). Conversely, the part-time judge may feel



**Does your state have a provision, like the 1990 model code, that restricts you from practicing in the court on which you serve? What is the citation for that provision? Is it identical to the model code version? If not, how is it different?**

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pressure to make rulings favorable to attorneys who are his or her opposing counsel in cases in the hope of receiving less aggressive treatment or certain advantages in negotiations when they are adversaries (*Florida Advisory Opinion 95-8*).

Further, if a part-time judge practices in the court on which he or she serves, court employees may give preferential treatment to the part-time judge when he or she is acting as an attorney (*Mississippi Bar Advisory Opinion 38* (1977)). Moreover, a part-time judge will be in a position to influence the disposition of cases in which he or she is involved as an attorney (*South Carolina Advisory Opinion 11-1987*) or at least a party might believe that the lawyer has special stature or other advantages in the court in which the lawyer acts as a judge (*Arizona Advisory Opinion 92-16*). Finally, if a part-time judge practices in the court on which he or she serves, the part-time judge may have to frequently disqualify from cases (*Alabama Advisory Opinion 88-348*).

Even if none of these potential problems develop into actual problems, the public may have difficulty effectively distinguishing in which capacity a part-time lawyer judge is acting if the judge practices in the court on which he or she serves. The burden to distinguish when a part-time lawyer judge is acting as a judge and when he or she is acting

as a lawyer “should not even be placed on the public’s shoulders” (*Mississippi Bar Advisory Opinion 38* (1977)).

The rule prohibits a part-time judge from practicing law in the court on which he or she serves even if the appearance is in a routine matter or in a type of case unrelated to those over which he or she presides as a judge.

- A part-time acting judge may not appear on behalf of a client in the court in which the part-time judge presides, even if the appearance is simply to move to transfer the case. *New York Advisory Opinion 93-76*.
- A per diem family court judge may not practice divorce law in the district family court even if the judge’s assignments are restricted to non-divorce matters. *Hawaii Advisory Opinion 9-95*.
- A part-time state court judge cannot file dispossessory warrants and handle civil and criminal cases in that court even if another judge tries the cases. *Georgia Advisory Opinion 44* (1981).
- A master appointed to conduct probable cause hearings in mental commitment cases on an as-needed basis may not appear as an attorney on unrelated matters in the probate court for which he or she serves as a

master. *Texas Advisory Opinion 166* (1993).

*But see Tennessee Advisory Opinion 93-3* (a part-time judicial commissioner who handles criminal cases may appear as an attorney in civil cases in the court in which the judge serves or in any other court).

Not all states have adopted the model code rule. In fact, the West Virginia code of judicial conduct expressly allows continuing part-time judges to practice in the court on which they serve. Because the South Dakota code is silent on the issue, the South Dakota advisory committee inferred from that silence that a part-time child support referee (a periodic part-time judge) may appear before another referee representing a private client (*South Dakota Advisory Opinion 94-2*). In Kansas, the code limitation applies only to “law of the type which the judge is assigned to hear in the court on which the judge serves.”

However, in some states, even in the absence of a specific prohibition in the state code like that of the model code, the policy considerations discussed above have led judicial ethics advisory committees to infer a rule barring a part-time lawyer judge from practicing in his or her court. For example, although the Alabama Code of Judicial Ethics does not have a provision analo-

gous to paragraphs C(2) and D(2) of the model code, the Alabama advisory committee stated that a part-time municipal court judge may not appear in the court over which he or she occasionally presides subject to the call of the mayor (*Alabama Advisory Opinion 90-408*) and that a part-time municipal court judge may not practice law in his or her own court (*Alabama Advisory Opinion 88-348*).

Similarly, although there is no express rule in the Florida code of judicial conduct prohibiting part-time child support hearing officers from practicing law in the court in which they preside, citing conflicts of interest, the Florida advisory committee concluded that part-time child support hearing officers may not practice law in the court in which they preside despite the impact the rule might have on how many attorneys would be willing to serve as part-time hearing officers (*Florida Advisory Opinion 95-8*). *See also Florida Advisory Opinion 96-12* (a part-time general master/support enforcement hearing officer may not continue to practice family law in the same circuit in which he or she presides even if he or she does not appear before another general master, support enforcement hearing officer, or circuit judge).

## ***Defining the court on which a part-time judge serves***

The various levels, jurisdictions, types of court, and geographic areas into which courts are divided—limited jurisdiction courts; general jurisdiction courts; special jurisdiction courts; divisions such as family court, traffic court, and probate court; county courts; district courts; and circuit courts—raise questions about how to define “the court on which the judge serves” for purposes of determining in which courts a part-time judge may not practice.

If a county or circuit court is divided into different geographic areas with separate jurisdiction, the “court on which the judge serves” has been defined to include any court of the same class or level as the court on which the judge serves within the same county or

circuit, prohibiting a part-time judge from practicing in those courts, not just in the same courtroom or courthouse in which the judge sits.

☉ *Mark with a check any opinions from your state.*

- A part-time magistrate judge may not appear as an attorney in any magistrate court in the same county. *Georgia Advisory Opinion 224 (1997).*
- If a county court is divided into geographic districts of separate jurisdiction, a part-time county court judge may not practice law in any of the districts of that county court even if by statute he or she has no jurisdiction over other areas of the county. *Ohio Advisory Opinion 87-29.*
- A part-time traffic magistrate who sits in one county of a circuit may



**How have you defined the court on which you serve? List the courts in which you do not practice because of this restriction.**

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**List the courts of the same class or level as the court on which you serve within the same county or circuit (depending on how the courts are organized in your state) and in which you cannot practice law under this corollary to the rule.**

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not practice in the other counties of the same circuit. *Florida Advisory Opinion 97-23.*

- A part-time child support enforcement officer who performs duties in five counties of the circuit may not practice family law in the sixth county. *Florida Advisory Opinion 98-12.*
- A periodic part-time district judge is prohibited from practicing as a lawyer in any district court within the circuit in which the judge sits. *Hawaii Advisory Opinion 3-96.*

Noting that the phrase “the court on which the judge serves” is not defined, the Georgia commission explained:

It is obvious, however, that a part-time magistrate who is also a prac-

ticing attorney cannot appear as counsel in the same court in which such individual serves. Accordingly, the phrase “own court” can only be construed to mean the class of courts on which such individual serves.

*But see South Carolina Advisory Opinion 4-1996* (a part-time municipal judge may represent criminal defendants in other municipal courts within the county but only if the representation is in a matter such as a bond hearing that is ancillary to a general sessions trial and does not require mandatory findings of fact or in a full municipal trial if (1) the judge fully discloses his judicial position for the record of each matter and (2) the presiding judge affirmatively finds that no conflict or impropriety is involved in the municipal judge’s participation in the matter).

Moreover, if a county or circuit is divided into different divisions that handle different types of cases, the “court on which the judge serves” has been defined in most states to include any division or type of court within the same county or circuit as the court on which the judge serves, prohibiting a part-time lawyer judge from appearing in those courts.

☉ *Mark with a check any opinions from your state.*

- A part-time juvenile referee may not serve as a criminal defense lawyer in the county in which he or she serves as a judge. *West Virginia Advisory Opinion* (November 3, 1995).
- A part-time municipal judge may not represent criminal defendants in other courts within the same county

in which the judge serves as a judge. *New Mexico Advisory Opinion 89-1.*

- Part-time traffic magistrates who preside in the civil traffic division may not practice as attorneys in the criminal traffic division of the same county court. *Florida Advisory Opinion 92-48; Florida Advisory Opinion 93-26; Florida Advisory Opinion 93-35; Florida Advisory Opinion 93-36; Florida Advisory Opinion 93-37.*
- A part-time magistrate who presides in the small claims division of a municipal court may not practice law in the municipal court or its other divisions. *Ohio Advisory Opinion 98-3.*
- A part-time juvenile magistrate may not practice law in the probate court when the juvenile court is within the



**List the other types or divisions of court within the same county or circuit as the court on which you serve and in which you are not allowed to practice under this corollary to the rule.**

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probate division. *Ohio Advisory Opinion 98-3*.

- A part-time municipal magistrate who hears cases in the small claims division may not practice law in the municipal court. *Ohio Advisory Opinion 98-3*.
- A part-time judge who is an attorney may not practice law in any other court in the county in which the judge's court is located. *New York Advisory Opinion 90-54*.<sup>5</sup>

But see *Arizona Advisory Opinion 90-6* (a justice court small claims hearing officer may practice in the justice court because the small claims division and its function are separate and distinct from the overall justice court operations); *Hawaii Advisory Opinion 3-96* (a per diem district court judge may practice as an attorney within the county or circuit in which the judge sits in all levels of the courts other than the district court).

However, a part-time lawyer judge may practice law in counties or circuits other than the one in which he or she hears cases. The New York advisory

committee explained that "it is desirable to have lawyers act as town justices, and...practical difficulties would arise if, because of such limited public service, they were excluded from all practice before all town, village, or city courts, no matter where located" (*New York Advisory Opinion 88-81*).

- *Mark with a check any opinions from your state.*
- A part-time juvenile court judge of a court in one county may practice law in the juvenile courts of another county. *Georgia Advisory Opinion 69* (1985).
- In general, a per diem judge may practice as an attorney in any court in any county or circuit other than the one in which he or she sits as a judge. *Hawaii Advisory Opinion 3-96*.
- A part-time justice may appear before a part-time justice in another county. *New York Advisory Opinion 88-81*.
- A part-time child support referee may act as a lawyer on behalf of a divorce client before another part-time child support referee from a different cir-

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5 The New York opinion is based on a specific rule in its code that prohibits a part-time judge from practicing law "in any other court in the county in which his or her court is located, before a judge who is permitted to practice law," in other words, before another part-time lawyer judge (Rules of the Chief Administrator of the Courts Governing Judicial Conduct, Part 100, §100.6(B)(2)). See *In re Sack*, Determination (New York Commission on Judicial Conduct September 29, 1994) (censure for, among other misconduct, appearing before another part-time lawyer judge of the same county); *New York Advisory Opinion 88-60* (a part-time judge may not represent a client in another court in the same county initiated before a judge who is permitted to practice law, even if the case later is transferred to a judge who is not permitted to practice law, because the case would have been initiated in a court presided over by a judge who is permitted to practice law).



cuit on a modification issue. *South Dakota Advisory Opinion 94-2*.

- A part-time juvenile referee may serve as a criminal defense lawyer in counties other than where he or she serves as a judge. *West Virginia Advisory Opinion* (November 3, 1995).

The jurisdiction of the judge who appoints or supervises the part-time judge may be relevant to the definition of “the court on which the judge serves.”

- A part-time magistrate of a common pleas court may not practice law in the court on which the appointing judge serves. *Ohio Advisory Opinion 98-3*.
- A part-time juvenile magistrate may not practice law in the probate court when the juvenile court is within the probate division and the appointing

judge presides over both courts. *Ohio Advisory Opinion 98-3*.

- A master who is appointed by the county judge but serves at the will of the probate judge and hears mental health proceedings in the absence of the probate judge may not practice in probate court. *Texas Advisory Opinion 200* (1996).

### ***Appellate courts***

The rule also prohibits **continuing part-time judges** and **periodic part-time judges** from practicing “in any court subject to the *appellate* jurisdiction of the court on which the judge serves....” Application section, ¶¶ C(2) and D(2) (emphasis added). The purpose of this prohibition is to prevent a judge from appearing as an attorney before a judge whose decisions he or she may be reviewing as a judge and “the accompany-



**Identify any court subject to the appellate jurisdiction of the court on which you serve.**

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ing potential for the appearance of pressure and impropriety" (*South Carolina Advisory Opinion 5-1987*). See also *Arizona Advisory Opinion 90-6* (a court commissioner appointed by the superior court presiding judge may not practice in the justice court or the city court as the superior court exercises appellate jurisdiction over those courts).

However, the code is silent on the mirror image of that situation—whether a part-time lawyer judge may practice in a court that has appellate jurisdiction over the court on which the judge serves. Some states have interpreted that silence to permit such practice.

☉ *Mark with a check any opinions from your state.*

- A part-time magistrate may practice in the superior court that has appellate jurisdiction over the magistrate court. *Georgia Advisory Opinion 59* (1984).
- A part-time judge is not prohibited from practicing law in the court that has appellate jurisdiction over the judge. *Louisiana Advisory Opinion 26* (1976).
- A continuing part-time municipal judge may practice law in the district court that has jurisdiction over the

municipal court. *Nevada Advisory Opinion 98-4*.

- A part-time town justice may appear in the county court, which is the appellate court for actions commencing in the local courts within the county. *New York Advisory Opinion 88-135*.
  - A part-time municipal judge may practice in the court of common sessions that has appellate jurisdiction over the municipal court. *South Carolina Advisory Opinion 5-1987*.
  - A part-time judge may handle a case that may require an appeal to the state supreme court of appeals. *West Virginia Advisory Opinion* (December 6, 1996).
- In contrast, opinions in at least two states adopt a rule that prohibits a part-time lawyer judge from practicing in a court with appellate jurisdiction over the court in which the judge serves, at least in appeals from the judge's court.
- A newly appointed part-time municipal court judge should not continue to represent a client on an appeal de novo to the circuit court from a ruling of the municipal court even if the ruling took place prior to the judge's appointment and even if the client may be prejudiced if the judge with-



**What court has appellate jurisdiction over the court on which you serve? Do you agree that seeking to overturn a proceeding from your own court would not promote public confidence in the judiciary? Why or why not? How would you draft a rule that could be added to the code to expressly address this situation, either allowing a part-time judge to practice in courts that have appellate jurisdiction over the court on which they serve or prohibiting it?**

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draws as attorney on the appeal.  
*Alabama Advisory Opinion 84-225.*

- A part-time juvenile court referee may not accept appointments from the juvenile court to represent parties appealing judgements from that court to the circuit court or court of appeals because the judge would be seeking to reverse the judgement of a court of which the judge is a member. *Michigan Advisory Opinion 105 (1988).*

The Alabama committee explained:

[T]he described activity does not promote public confidence in the integrity and impartiality of the

judiciary since while serving as a judge, a lawyer would seek to overturn a proceeding occurring before his own court, even though that proceeding occurred prior to the judge's assuming the bench. Further, the proceeding could again come before the municipal court over which the judge presides.

***Pro tempore part-time judges***

The code provision prohibiting a lawyer from practicing law in the court on which he or she serves as a part-time judge does not apply to **pro tempore part-time judges**. Application section, ¶ E(2). Therefore:

- An attorney who has served for a limited time as a circuit judge pro tempore to dispose of criminal cases appealed from municipal court may serve as an attorney in unrelated cases in the circuit court. *Alabama Advisory Opinion 95-568*.
- An attorney who sits as a special judge while judges of the family court are away on court business or vacation may practice law before the family court in unrelated cases. *Alabama Advisory Opinion 95-572*.
- An attorney who is serving for a limited time on a volunteer and unremunerated basis as a special circuit judge to dispose of criminal cases appealed from municipal court may practice law before the circuit court in unrelated cases. *Alabama Advisory Opinion 95-573*.
- A juvenile court judge pro tempore may also practice in the juvenile court except in proceedings in which he or she has served as judge or in any other proceeding related thereto. *Georgia Advisory Opinion 180 (1993)*.
- A pro tempore judge is not prohibited from practicing law in the court in which he or she has served or is serving. *Washington Advisory Opinion 91-23*.

The Washington judicial ethics committee, however, warned that even though a pro tempore part-time judge may practice in the court on which he or she serves, both the court and the lawyer-judge must avoid conduct that could lead a reasonable person to conclude that the lawyer-judge is receiving preferential treatment from the court and/or court staff. *Washington Advisory Opinion 91-23*.

In contrast, the Kansas code of judicial conduct expressly prohibits a pro tempore part-time judge from “appear[ing] as a lawyer in the court or specialized division to which the judge is assigned,” but only “during such service.” Interpreting this provision, the Kansas advisory committee stated that a district judge pro tempore may appear as a lawyer in the district court, but not while serving as a judge pro tempore (*Kansas Advisory Opinion JE-86 (1999)*).

Moreover, the Louisiana advisory committee concluded that the practice of law by a temporary judge before the court on which he or she sits would create the appearance of impropriety and, therefore, even in the absence of an express rule, prohibited an attorney appointed to temporarily fill a judicial vacancy from practicing law before the court on which he or is sitting (*Louisiana Advisory Opinion 42 (1978)*).

After the Arizona advisory committee issued an opinion stating that a part-

time pro tempore judge who sits in a court without specialized sections may not appear as a lawyer in the court in which he or she serves (*Arizona Advisory Opinion 92-16*), the Arizona Supreme Court amended the code of judicial conduct to, according to the commentary, “allow the greatest possible use of part-time pro tempore judges to augment judicial resources in order to reduce case backlogs and the time necessary to process cases to disposition while minimizing any potential for the appearance of impropriety.” The revised Arizona code provides:

- A pro tempore part-time judge who serves once or only sporadically in a specialized division of a court or in a court without specialized divisions may appear as a lawyer in such specialized division or court during such service.
- A pro tempore part-time judge who serves repeatedly on a continuing, scheduled basis in a specialized division of a court or in a court without specialized divisions shall not appear as a lawyer in such specialized division or court during such service.
- A pro tempore part-time judge who is appointed to perform judicial functions of a non-appealable nature on a continuing scheduled basis shall not

appear as a lawyer in other proceedings involving the function of the court in which the service was performed, but may appear as a lawyer in all other areas of practice before the court.

### ***PARTNERS OF A PART-TIME JUDGE PRACTICING IN THE JUDGE’S COURT***

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States are divided on the issue whether a partner of a part-time judge is prohibited from practicing in the court on which the judge serves, in other words, whether the prohibition is imputed to a partner.

The code of judicial conduct does not apply directly to lawyers, but a part-time judge’s continued association with a lawyer whose practice gives rise to the appearance of impropriety may implicate Canon 2 by contributing to an apparent impropriety. Moreover, partnership with an attorney is a “financial and business dealing,” and part-time judges are not exempt from the requirement that a judge avoid dealings that may reasonably be perceived to exploit the judge’s judicial position (Canon 4D(1)).

- *Mark with a check any opinions from your state.*

The Texas advisory committee cited the Canon 2B prohibition on a judge permitting others to convey the impression that they are in a special position to influence the judge and noted that if partners or associates of a part-time judge practice in the judge's court, they would be in a position to convey this impression (*Texas Advisory Opinion 190* (1996)). Therefore, the committee concluded, partners or associate attorneys of a part-time associate judge may not practice in the court where the associate judge is appointed to serve. *See also Texas Advisory Opinion 132* (1989) (a part-time judge may not practice law with a lawyer who represents an accused in a criminal case before another judge).

The Hawaii judicial ethics committee stated that because the appearance by a member of a per diem judge's firm before other judges on the same court would create an appearance of impropriety or undermine public confidence in the judiciary, the judge is required to try to prevent his or her attorney-colleagues from appearing before his or her judicial-colleagues and, if that attempt is unsuccessful, to terminate the association with attorneys who appear in the judge's court (*Hawaii Advisory Opinion 3-96*). *See also Hawaii Advisory Opinion 1-98* (lawyers who are "of counsel" to the law firm of a per diem district judge may not practice in the

district court within the circuit in which the per diem judge sits).

The Arizona judicial ethics committee stated that associates and partners of a part-time judge generally may not appear in the judge's court even if the judge does not hear any of their cases (*Arizona Advisory Opinion 92-16*). The committee explained:

Although the appearance of impropriety is arguably attenuated compared to that created when the judge herself practices before the court, the taint remains. An observer or party might suspect that the lawyer's association with the part-time judge fosters special influence.

(The Arizona Supreme Court stayed the effect of *Arizona Advisory Opinion 92-16* until further notice to allow courts additional time to consider potential administrative problems that could not be addressed in the opinion.)

Opinions from other states have reached the same conclusion.

- Law practice proscribed to a part-time traffic magistrate is proscribed to the magistrate's partner. *Florida Advisory Opinion 90-26*.
- An associate attorney employed by a part-time traffic hearing officer may not represent defendants charged with driving under the influence of alcohol. *Florida Advisory Opinion 98-23*.



- A judge of another division of a part-time judge's court may not preside over cases in which the law partners and associates of the part-time judge appear. *Louisiana Advisory Opinion 46* (1979).

See also *Indiana Policy Statement on Part-Time Judges* (1983) (although noting that it did not have authority over attorneys, the committee stated there is authority to extend limitations on a part-time judge to the partners and associates of the judge).

The application section of the New York code has a specific rule that addresses the limits on the practice of a part-time judge's partners and associates:

A part-time judge shall not permit his or her partners or associates to practice law in the court in which he or she is a judge, and shall not permit the practice of law in his or her court by the law partners or associates of another judge of the same court who is permitted to practice law, but may permit the practice of law in his or her court by the partners or associates of a judge of a court in another town, village or city who is permitted to practice law.

- If an associate is acting as an employee of a part-time judge and handling cases for that part-time judge, the associate's appearance in any court is equivalent to an appearance

by the part-time judge, and the associate may not practice in the judge's court or in any other court in the same county that is presided over by a judge who is permitted to practice law. *New York Advisory Opinion 87-10*.

- If an associate is carrying on an independent practice, not as an employee of a part-time judge, the associate may appear before a part-time judge in another town, village, or city who is permitted to practice law but may not appear in the court in which the part-time judge with whom he or she is associated is a judge. *New York Advisory Opinion 87-10*.
- Members and associates of a law firm may practice law in a different court within the same county as the court over which one of the members of the firm, who is also a judge, sits. *New York Advisory Opinion 93-43*.
- A judge is disqualified if an associate of another part-time judge of the same court appears in the judge's court. *New York Advisory Opinion 88-156*.
- An attorney who rents office space from and provides of counsel services for a fee to a part-time judge may not practice law in the judge's court



before another lawyer-judge. *New York Advisory Opinion 89-160*.

- An attorney who shares office space with a part-time judge may not practice law in the judge's court. *New York Advisory Opinion 97-46*.

However, other states allow the law partners or associates of a part-time judge to practice law in the court on which the part-time judge serves so long as the partners or associates do not appear before the part-time judge. The Ohio advisory committee explained:

The law partners and associates of a part-time magistrate are not judicial officers. The partners and associates are not cloaked with any judicial authority. They would not carry the part-time magistrate's prestige and authority into the courtroom with them. Their appearance in the courtroom on behalf of a client would not raise ethical concerns unless they stated or implied they had the ability to influence improperly or upon irrelevant grounds the tribunal...or unless they appeared before their partner who is magistrate.

*Ohio Advisory Opinion 98-3*.

Other judicial ethics advisory committees have reached the same conclusion.

- *Mark with a check any opinions from your state.*
- If a part-time judge is disqualified from handling a private case because

of restrictions in the code of judicial conduct, the disqualification is not imputed to other members of the part-time judge's law firm, and they may handle matters before the part-time judge's court although not before the part-time judge. *Michigan Advisory Opinion II-97* (1994). *But see Michigan Advisory Opinion CI-779* (1982) (the partners of a part-time probate judge may not practice in the part-time probate judge's court).

- The disqualification of a part-time judge from practicing law in the court on which he or she serves is not imputed to partners who practice law with the judge. *South Carolina Advisory Opinion 27-1994*.

## ***PART-TIME JUDGES ACTING AS DEFENSE ATTORNEYS IN CRIMINAL CASES***

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### ***In general***

Concerns have been expressed about the public's perception of a part-time judge presiding over criminal cases as a judge while contesting prosecutions brought by the state as an attorney. The fear is that if a part-time judge can also be a criminal defense lawyer, some defendants may choose lawyers who are part-time judges because of a perceived advantage in being defended by a judge or because some part-time lawyer judges may unwittingly give the impression that they are in a position of special influence. Furthermore, some members of the public may perceive that a judge who also acts as a defense

attorney would be biased in favor of the defense when presiding over a prosecution. See *Indiana Advisory Opinion 7-90*.

Despite those conflicts, however, in most states, a part-time lawyer judge may represent defendants in criminal cases, and a criminal defense attorney may serve as a part-time judge, with certain restrictions discussed below. Although it initially adopted a policy that a part-time judge who exercises criminal or juvenile jurisdiction could not practice criminal or juvenile defense in any court in the state (*Indiana Policy Statement* (December 8, 1983)), the Indiana advisory committee subsequently overturned that policy (*Indiana Advisory Opinion 7-90*). The committee concluded that the "nebulous dangers" presented by a part-time judge practicing criminal defense law were



**Identify several arguments why a part-time judge *should not* be able to act as a defense attorney in criminal cases. Identify several arguments why a part-time judge *should* be able to act as a defense attorney in criminal cases.**

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outweighed by the practical problem caused when “many talented practitioners” declined to serve as part-time judges because “to forfeit their criminal defense practices demanded too great a sacrifice.”

Similarly, in advising that a criminal defense attorney may serve as a temporary part-time judge on the criminal bench, the Arizona judicial ethics committee stated that the argument “that criminal defense advocacy is inconsistent with—gives ‘an appearance of impropriety’ to—judicial neutrality is itself inconsistent with the concept of pro tem service, that lawyers can render valuable service to the public by using the knowledge acquired as advocates to resolve fairly the disputes of others” (*Arizona Advisory Opinion 95-17*). The committee acknowledged that “occasional use of lawyers in private practice as pro tem judges almost always involves a use in the area of special expertise of the serving lawyer...[and], therefore, the risk that an opponent one day may be a judge on another day.” However, the committee noted the intent of the supreme court, evidenced in the commentary to the Arizona code, “to allow the greatest possible use of part-time pro tempore judges to augment judicial resources.” Therefore, the committee concluded, a part-time lawyer judge successively hearing criminal cases as a judge and defending

different criminal cases as a lawyer was not contrary to the code. *But see* discussion of part-time judges being public defenders, at page 73, *infra*.

The opinions from most states are consistent with this reasoning and allow part-time judges, including those with criminal jurisdiction, to represent defendants in criminal cases, with the limitations noted below.

◎ *Mark with a check any opinions from your state.*

- *Georgia Advisory Opinion 107* (1988).
- *Missouri Advisory Opinion 81* (1982).
- *New York Advisory Opinion 87-18*; *New York Advisory Opinion 88-82*; *New York Advisory Opinion 89-69*.
- *Oregon Advisory Opinion 91-102*.
- *South Carolina Advisory Opinion 1-1982*; *South Carolina Advisory Opinion 5-1987*; *South Carolina Advisory Opinion 4-1996*; *South Carolina Advisory Opinion 25-1996*.
- *Tennessee Advisory Opinion 93-3*; *Tennessee Advisory Opinion 95-2*.
- *Washington Advisory Opinion 91-13*.
- *West Virginia Advisory Opinion* (November 3, 1995).

*Cf.*, *Tennessee Advisory Opinion 91-9* (a part-time judge who hears probate

and domestic relations cases may also practice law in these areas in other courts).

However, the New Mexico judicial ethics committee advised that a part-time lawyer judge may not act as a criminal defense attorney (*New Mexico Advisory Opinion 89-5*). The committee pointed out that conflicts could arise from “the relationship the judge-criminal attorney would have with attorneys he is in an adverse position with when acting as a defense attorney and the impartial relationship he must

maintain as a judge ruling on other cases the adverse attorney may have before him.” The committee also noted that a part-time lawyer judge who practices criminal law will be praying for leniency or mitigation when acting for his or her criminal clients, while as judge, he or she will be sentencing other defendants for the same crime under similar situations. *See also New Mexico Advisory Opinion 89-1* (a part-time lawyer judge may not represent criminal defendants within the same county in which he or she serves as judge).



**Do you agree with the majority position that a part-time judge may act as defense counsel in criminal cases? Or do you agree with the New Mexico advisory committee that such a situation creates too many conflicts? If the New Mexico rule were adopted in your state, how would it affect your practice? How would you draft a rule that could be added to the code to expressly address this situation, either allowing part-time judges to represent criminal defendants or prohibiting it? If a part-time judge also serves as a defense attorney, what types of precautions should he or she take?**

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Moreover, even in those states in which a part-time lawyer judge is allowed to be a criminal defense attorney, there are limitations imposed on his or her criminal defense practice. At least in some jurisdictions, a part-time judge may not represent criminal defendants when the prosecuting attorney representing the state regularly appears before the judge; may not represent criminal defendants on any type of charge that could be brought in the judge's court; and may not regularly or exclusively represent criminal defendants, at least if the judge has jurisdiction over criminal cases.

The Arkansas advisory committee stated that a part-time judge may not represent a criminal defendant in any circuit within which the prosecuting attorney who regularly appears before the judge also represents the state (*Arkansas Advisory Opinion 98-2*). The committee reasoned:

It is, we believe, self evident that a municipal judge who is engaged in an adversarial role opposing a prosecuting attorney in a criminal case brought by the State and who presides over proceedings involving that same prosecuting attorney is in an untenable position, however principled that individual may be. Acting as both judge and jury, the municipal judge has significant discretion in dealing with the prosecuting attorney. To oppose that same attorney in another

matter creates an appearance of impropriety.

The committee concluded that "license must yield to ethic," and a part-time lawyer judge has an initial responsibility "to decline the personal representation of a criminal defendant in any circuit within which the prosecuting attorney has jurisdiction." *Cf.*, *Arkansas Advisory Opinion 98-3* (a part-time judge who is representing a client in a court over which the prosecuting attorney who practices in the judge's court has jurisdiction may complete representation of the defendant in pending matters, but should not accept such representation beyond that).

Other judicial ethics committees have reached a similar conclusion.

- A part-time judge may not accept cases in which he or she would be acting as adversary counsel to the office of the prosecuting attorney or the assistant prosecuting attorney assigned to his or her courtroom. *Michigan Advisory Opinion CI-248* (1976).
- A part-time municipal judge may not practice criminal law within the municipality in which he or she sits. *Missouri Advisory Opinion 81* (1982).

Furthermore, to "address some of the potential conflicts inherent in a part-time judge's dual professional life with-

out undue restriction," the Indiana judicial ethics committee advised that part-time judges may represent criminal defendants "except as to any *type* of charge that could be brought in the judge's court" (*Indiana Advisory Opinion 7-90*). (The committee noted this advice did not apply to pro tempore judges.) As an example, the committee stated that a part-time judge with jurisdiction over traffic infractions may not defend any such charge in any jurisdiction.

The Georgia advisory committee expressed reservations about "the regular or exclusive representation of [criminal] defendants by a judge, one of whose responsibilities include the issuance of criminal warrants or the trial of criminal cases...." *Georgia Advisory Opinion 107* (1988). Regular or exclusive representation, the Georgia committee stated, "might destroy the appearance of impartiality and integrity essential to the administration of justice and, therefore, be inappropriate."

### ***Representation of indigent defendants***

Additional ethical issues are raised when a part-time lawyer judge receives fees from the government for representing indigent criminal defendants. The question whether such representation is

appropriate has been resolved differently in different states.

- *Mark with a check any opinions from your state.*
- In some states, a part-time lawyer judge **may not** receive fees from the government for representation of indigent criminal defendants. *Georgia Advisory Opinion 185* (1993); *Missouri Advisory Opinion 63* (1982); *Washington Advisory Opinion 90-2*.
- In some states, a part-time lawyer judge **may** receive fees from the government for representation of indigent criminal defendants. *Arizona Advisory Opinion 95-17*; *New York Advisory Opinion 91-86*.
- In some states, a part-time lawyer judge **may not** be a public defender. *Arizona Advisory Opinion 94-8*.
- In some states, a part-time lawyer judge **may** be a public defender. *New York Advisory Opinion 90-143*; *New York Advisory Opinion 95-81*.

Advising that a part-time judge may not regularly represent indigent criminal defendants, the Georgia committee noted that a part-time lawyer judge defending indigent criminal defendants is paid with public funds for both the judge's judicial service and the practice of law (*Georgia Advisory Opinion 185*



(1993)). The committee concluded that the fact that a judge routinely hears and disposes of criminal matters “might suggest to an average citizen that such judge/attorney might be in some special position to exert...influence or otherwise obtain a more lenient sentence from a fellow judge than would a non-judge attorney, and thus give rise to an impermissible appearance of impropriety.” The advisory committees in Missouri and Washington reached the same conclusion. *Missouri Advisory Opinion 63* (1982); *Washington Advisory Opinion 90-2*. In Washington, there is a prohibition on a law firm contracting to provide indigent legal defense work if a part-time judge is a member of that firm. *Washington Advisory Opinion 86-14*; *Washington Advisory Opinion 89-6*.

The Arizona judicial ethics committee, however, advised that criminal defense attorneys who have contracts with the county to handle indigent defense criminal cases may serve as part-time judges (*Arizona Advisory Opinion 95-17*). Stating that “[i]t does not matter that public funds are used to pay for the criminal defense services,”

the committee reasoned that “the criminal defense attorney’s client is the indigent defendant, not the public entity making payment,” and “[i]f public payment does not disqualify one from serving the criminal defendant without conflict, it does not disqualify from serving as a judge.” *See also New York Advisory Opinion 91-86*.

In contrast, the Arizona advisory committee concluded that a part-time lawyer judge could not be a public defender (*Arizona Advisory Opinion 94-8*). That conclusion was based, not on a conflict of interest, but on the argument that the public defender is part of the executive branch, and, therefore, the service of a public defender as a pro tempore judge is considered inconsistent with the separation of powers doctrine. In contrast, in New York, a part-time lawyer judge may be a public defender (although as a judge, he or she may not preside over any matters handled by other attorneys from the public defender’s office). *New York Advisory Opinion 90-143*; *New York Advisory Opinion 95-81*.



**Does your jurisdiction have a prohibition on judges holding two public offices? If so, what is its cite?**

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## ***PART-TIME JUDGES SERVING AS PROSECUTORS***

### ***States where a part-time judge may not act as a prosecutor***

In most states, a part-time judge may not prosecute cases on behalf of the government—and a prosecutor may not serve as a part-time judge—because the two offices are considered incompatible.

- *Mark with a check any opinions from your state.*
- Attorney generals, county attorneys, and city attorneys may not serve as pro tempore judges. *Arizona Advisory Opinion 94-8. See also Arizona Advisory Opinion 95-8.*
- A part-time traffic magistrate may not serve as a part-time uncompen-

sated special assistant state attorney. *Florida Advisory Opinion 95-23.*

- An assistant county attorney may not be an unpaid traffic magistrate. *Florida Advisory Opinion 92-14.*
- A part-time judge may not serve as an assistant prosecuting attorney in the judge's court. *Georgia Advisory Opinion 137 (1989).*
- A part-time judge may not serve as an assistant district attorney in the judge's court. *Georgia Advisory Opinion 154 (1991).*
- A part-time judge may not serve as a prosecutor in any court. *Georgia Advisory Opinion 181 (1993).*
- An assistant county attorney may not also serve as a part-time domestic



**Identify several arguments why a part-time judge *should not* be able to act as a prosecutor in criminal cases. Identify several arguments why a part-time judge *should* be able to act as a prosecutor.**

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relations commissioner. *Kentucky Advisory Opinion JE-76*.

- A city judge may not serve as an attorney for a police jury in a neighboring parish on a contractual basis. *Louisiana Advisory Opinion 92* (1991).
- An assistant prosecuting attorney may not also serve as a part-time magistrate. *Michigan Advisory Opinion II-56* (1992).
- A part-time judge may not serve as district attorney. *New York Advisory Opinion 90-188*.
- A village prosecutor may not serve as a part-time judge. *New York Advisory Opinion 92-108*.
- A part-time town justice may not serve as a special prosecutor for the district attorney's office. *New York Advisory Opinion 93-33*.
- A part-time judge may not accept referrals of appeals from the district attorney's office of the county in which the judge's court is located even if the judge's law partner or associate does the work in the matter. *New York Advisory Opinion 96-72*.
- A part-time judge may not also serve as a city prosecutor of another city.

*South Carolina Advisory Opinion 3-1991*.

- A part-time city judge may not also prosecute cases as a city attorney even if the cases are not prosecuted in the city court. *South Carolina Advisory Opinion 10-1994*.
- A part-time municipal court judge may not serve as the town attorney even if someone else were to prosecute cases in the municipal court. *Washington Advisory Opinion 90-3*.
- A part-time district court judge may not enter into a contract with the county prosecutor's office to act as an attorney handling paternity cases. *In re Goelz* (Washington Commission on Judicial Conduct 1990) (admonishment).

For states that have not adopted this rule, *see* discussion at page 78, *infra*.

This rule contrasts with the rule generally allowing part-time lawyer judges to represent defendants in criminal cases. *See* discussion at page 69, *supra*. The distinction between being defense counsel and being a prosecutor is that prosecutors have a special relationship with the police and law enforcement authorities that is inconsistent with being a judge (*New York Advisory Opinion 90-188*).

Noting “the anomaly of the judge alternating prosecutorial and judicial duties,” the Michigan judicial ethics committee stated that the “ability to act as a neutral and detached judicial officer one day a week after advocating for the people as an assistant prosecutor the rest of the week is simply too much to expect from the human personality” (*Michigan Advisory Opinion JI-56* (1992)). The committee also explained:

The dual role of prosecutor one day and magistrate the next could cause the person to be dealing with the same defense lawyer or defendant as an adversary on one occasion and as a trier of fact on another.... The appearance that an advocate may be less vigorous in representing a party against the prosecutor, knowing that on subsequent days the advocate will be appearing before that prosecutor sitting as a magistrate, will affect public confidence in the system of justice.

Similarly, the Georgia committee reasoned:

The public is likely to believe that a judge who simultaneously serves as a prosecutor...will be partial to the state, and an appearance of impropriety will arise.... Simply stated, dual service as a judge and prosecutor would inevitably lead to the erosion of public confidence demanded by...Canon [2] and essential to the proper administration of justice and cannot be sanctioned.

*Georgia Advisory Opinion 181* (1993). Finally, in advising that an assistant

prosecutor may not serve as a pro tempore judge, the Arizona advisory committee explained:

We doubt that a criminal defendant would feel confident about our system of justice upon seeing someone act as a prosecutor one day, and then appear behind the bench as the judge in the same courtroom the next day. In our opinion, doubts about the fairness of treatment under this arrangement would be a quite reasonable reaction.

*Arizona Advisory Opinion 95-8*.

Under the rule, there is no distinction between part-time, contract prosecutors and full-time prosecutors, and the former as well as the latter are disqualified from serving as part-time judges.

- Part-time, contract attorney generals, county attorneys, and city attorneys may not serve as pro tempore judges. *Arizona Advisory Opinion 95-8*.
- A city judge may not serve as an attorney for a police jury in a neighboring parish on a contractual basis. *Louisiana Advisory Opinion 92* (1991).
- A temporary associate probate judge may not perform contract legal work for the county attorney’s office from the same county in which the judge is employed as a judge. *South Carolina Advisory Opinion 3-1991*.

Moreover, under this rule, where the part-time lawyer judge will be serving as a prosecutor is irrelevant; a part-time lawyer judge may not serve as a prosecutor even in a different jurisdiction than the one in which he or she sits.

*Arizona Advisory Opinion 95-8; Louisiana Advisory Opinion 92 (1991); Michigan Advisory Opinion II-56 (1992); South Carolina Advisory Opinion 3-1991.*

Some opinions also cite the principle of separation of powers (part-time judges are members of the judicial branch; part-time prosecutors are members of the executive branch) or statutory or constitutional provisions prohibiting an individual from simultaneously holding two offices. *See Arizona Advisory Opinion 94-8; Michigan Advisory Opinion II-56 (1992).*

### ***States where a part-time judge may act as a prosecutor***

Some states, however, allow lawyers to serve as both part-time judges and prosecuting attorneys.

☉ *Mark with a check any opinions from your state.*

- A part-time municipal court judge may also serve as a part-time district attorney. *Alabama Advisory Opinion 86-251.*

- A part-time city attorney in one city may also be a part-time municipal judge of another city. *Kansas Advisory Opinion JE-49.*
- A municipal judge may also serve as a prosecutor in the same type of cases that the judge is assigned to hear as a judge so long as they are not cases in the court in which the judge serves. *Kansas Advisory Opinion JE-72 (1997).*
- A part-time district court judge may also serve as the town attorney and prosecute cases in the municipal court where there is no relationship between the district and municipal courts except that they are located in the same town. *Washington Advisory Opinion 90-3.*
- A deputy prosecuting attorney may be appointed as a pro tem judge. *Washington Advisory Opinion 92-3.*
- A part-time county district court judge may serve as a city prosecutor for a city in the same county as the judge presides. *Washington Advisory Opinion 96-7.*
- A part-time appellate deputy prosecuting attorney who is solely responsible for criminal appeals and does not work in the trial court or supervise attorneys who work in the

trial court may serve as a commissioner pro tem hearing dependency cases. *Washington Advisory Opinion 97-18*. But see *In re Goelz*, Stipulation, Agreement, Order of Admonishment (Washington Commission on Judicial Conduct 1990) (part-time district court judge admonished for entering into a contract with the county prosecutor's office to act as an attorney handling paternity cases).

- A part-time circuit court commissioner who conducts initial appearances in criminal, small claims, civil traffic, and forfeiture cases may act as a prosecutor in municipal traffic and forfeiture cases that are processed

through the same circuit court. *Wisconsin Advisory Opinion 98-2*.

There are several caveats to these judicial ethics advisory committees' advice, however. For example, although the Washington committee stated that a deputy prosecuting attorney may be appointed as a pro tem judge, it warned that the attorney should not be appointed to hear any cases in which another attorney from that prosecutor's office is or may be involved (*Washington Advisory Opinion 92-3*). Further, the committee instructed the attorney, when serving as a judge in a case, to disclose his or her employment as a deputy prosecuting attorney to the parties if a reasonable person would



**Do you think a part-time judge should be allowed to act as a prosecutor in criminal cases? Why or why not? How would you draft a rule that could be added to the code to expressly address this situation, either allowing a part-time judge to act as a prosecutor or prohibiting it? If a part-time judge also serves as a prosecutor, what types of precautions should he or she take?**

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conclude it is relevant to the issue of disqualification. Finally, the committee cautioned that, even though a pro tempore part-time judge is not prohibited from practicing in the court in which he or she has served or is serving as a judge, the court and the judge must avoid conduct that would lead a reasonable person to conclude that the judge is receiving preferential treatment from the court and/or court staff when acting as a prosecuting attorney.

Moreover, the Washington advisory committee stated that a part-time district court judge who also serves as a city prosecutor may not as a judge hear a case involving a defendant whom the judge is simultaneously prosecuting in municipal court because an appearance “is created that cannot be overcome that the information received in the proceeding which is being prosecuted by the judicial officer as city prosecutor may influence the judicial officer’s decision when he or she is presiding in a judicial capacity” (*Washington Advisory Opinion 96-7*). If the judge as city attorney prosecuted the defendant in the past, the committee advised, the judge should disclose that on the record if the prosecution was in an unrelated matter and should withdraw from the proceeding if the previous matter was in any way related to the proceeding presently before the judge or if other circumstances justify disqualification. The

committee stated that the part-time judge/city attorney must ask a defendant whether the judge may have prosecuted the defendant as city attorney in a previous case, which may require the judge to disclose the dual positions and advise on the record that he or she has no independent recollection of the parties and is seeking information from the parties that may require disclosure and/or recusal.

In fact, even though the Washington committee authorized a part-time county district court judge to serve as a city prosecutor, the committee warned the judge to consider several factors before taking the city prosecutor position (*Washington Advisory Opinion 96-7*). Noting that judicial duties must take precedence over other duties even for part-time judges, the committee cautioned that dual service as a judge and city attorney would be inappropriate if the judge would have to frequently recuse from cases because the judge had either prosecuted or adjudicated another matter in which the defendant was involved and/or if the practice of asking on the record for information that may require disclosure and/or recusal interfered with the performance of the judge’s judicial duties.

Furthermore, although the Wisconsin judicial ethics committee authorized a part-time circuit court commissioner who conducts initial appearances in





## ***PART-TIME JUDGES REPRESENTING THE GOVERNMENT AS A CLIENT***

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Representation of a government entity by a part-time lawyer judge may be prohibited or at least limited by conflicts with the lawyer's part-time judicial duties even if the representation involves tasks other than prosecuting crimes. Judicial ethics opinions in several states have advised that a judge may not be retained by the government entity in which the judge sits to give the entity legal advice or provide legal services. *But see* discussion of states in which such representation is permitted at page 78, *infra*.

☉ *Mark with a check any opinions from your state.*

- A part-time city judge may not represent the city in which the judge serves regardless of the forum. *Arkansas Advisory Opinion 97-4*.
- A part-time judge may not represent the county in which the municipality in which the judge sits is located as the county's civil attorney defending all civil litigation in which the county is a party, providing advice and opinions to county employees and elected officials, and drafting and reviewing ordinances. *Arkansas Advisory Opinion 99-2*.

- A part-time master in equity for a county may not serve as the town attorney for a town in the same county. *South Carolina Advisory Opinion 25-1994*. Compare *South Carolina Advisory Opinion 8-1999* (a part-time municipal court judge may serve as a solicitor in a circuit that does not encompass the municipality in which he serves as judge).
- An associate probate judge who performs contract legal work for the same county would violate the constitutional prohibition against dual office holding. *South Carolina Advisory Opinion 11-1998*. Compare *South Carolina Advisory Opinion 8-1999* (a part-time municipal court judge may serve as a solicitor in a circuit that does not encompass the municipality in which he serves as judge).
- A part-time municipal judge may not serve as city attorney for the city in which he sits. *Texas Advisory Opinion 173* (1994).
- A part-time judge may not contract with a government entity or continue to be a member of a firm that contracts with a government entity to provide legal services before the same level of court and in the same city as the judge serves. *Washington Advisory Opinion 91-17*.

The Arkansas advisory committee explained:

Representing the city may create, in reasonable minds, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.... The judge's private law practice should be as far removed as possible from the court and the city in which the judge serves. The public cannot be expected to understand the fine lines of jurisdictional issues and would tend to look at the judge as both the attorney and the judge for the city.

*Arkansas Advisory Opinion 97-4.* The committee acknowledged that this "creates a very difficult situation for municipal judges in our state who must supplement their income by practicing

law" but concluded that in "matters affecting the image and integrity of the judiciary, we should be very sensitive and, if it is a close case, err on the side of caution."

The Texas judicial ethics committee concluded that numerous code provisions from which part-time judges are not exempt would be violated if a part-time municipal judge served as city attorney for the city in which the judge sits, including the requirements that a judge uphold the integrity and independence of the judiciary; act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary; and give precedence to judicial duties over all the judge's other



**Identify several arguments why a part-time judge *should not* be able to act as an attorney for the government entity in which the judge sits (for example, why a town court judge should not act as town attorney). Identify several arguments why a part-time judge *should* be able to act as an attorney for the government entity in which the judge sits.**

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activities (*Texas Advisory Opinion 173* (1994)). The committee also noted the prohibitions on a judge conveying or permitting others to convey the impression that they are in a special position to influence the judge; being swayed by partisan interest, public clamor, or fear of criticism; performing judicial duties with bias; and engaging in financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of judicial duties, exploit his or her judicial position, or involve the judge in frequent transactions with persons likely to come before the court on which the judge serves. The committee also cited the prohibitions on judges

receiving compensation if the source gives the appearance of influencing the judge's performance of judicial duties or otherwise creates the appearance of impropriety, and making statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office that the judge holds. *Compare New York Advisory Opinion 95-3* (a part-time judge should not serve as legal in-house counsel to the local housing authority where such service would cause excessive recusals); *New York Advisory Opinion 91-103* (a part-time judge may not represent the town board in negotiating a contract with that town's police union whose members regularly appear before the judge);



**How would you draft a rule that could be added to the code to expressly allow a part-time judge to act as an attorney for the government entity that funds the court on which the judge sits or prohibit it?**

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*New York Advisory Opinion 96-29* (a part-time judge may not practice law before the zoning and planning boards of the village where the judge sits) *with New York advisory opinions cited at pages 86-87, infra.*

Other states, however, allow part-time judges to represent a government entity, with certain restrictions. For example, the Michigan advisory committee stated that a part-time judge may represent the municipality that funds the court on which the judge sits unless such representation would “materially limit” the judge’s judicial duties (*Michigan Advisory Opinion 11-97* (1994)). The committee noted that it

could be argued that, because the city is the magistrate’s private client, the magistrate might be more likely to find for the government in criminal and civil matters arising before the magistrate. If so, there could be an appearance of bias which might merit a disqualification of the magistrate....

However, the committee concluded that the mere potential for abuse should not prohibit all private representation of the funding unit by the magistrate, noting that “in theory, a lawyer may agree to represent a client in one matter but not agree with the client’s position in an unrelated matter.” The committee stated:

If the representation of the funding unit is a single, isolated representa-

tion, on a civil cause of action over which the magistrate has no adjudicative jurisdiction, recusal of the magistrate in cases coming before the magistrate’s court might not be necessary. If, on the other hand, the representation of the funding unit is protracted, an ongoing representation rather than a single case, or one which results in substantial financial impact on the magistrate’s firm, the magistrate should analyze the ethical obligations to avoid frequent disqualification and financial conflicts.

*See also Tennessee Advisory Opinion 90-10* (a part-time general sessions and juvenile judge may serve as counsel to a county or municipality on a case-by-case basis).

Similarly, the New Hampshire Supreme Court amended the code of judicial conduct applicable to New Hampshire judges to allow a part-time judge to act as counsel to the town in which the judge’s court is located or a town within the judicial district of the judge’s court provided the part-time judge complied with restrictions on both his or her law practice and his or her judicial duties (*Petition of the New Hampshire Judges Association*, 490 A.2d 1374 (New Hampshire 1985)). As counsel for the town, the part-time lawyer judge may not give advice to the town’s police officers or any other officer or employee of the town that could reasonably be expected to influence their exercise of discretion in the

performance of their duties or on a matter that could reasonably be expected to be the subject of any action or suit before the judge's court. Moreover, as a judge, the judge must recuse from any case in which the judge's advice to the town is directly called into question or in which a ruling could directly affect the interests of the town.

Similarly, the Washington judicial ethics committee stated that a part-time district court judge may serve as a city attorney to draft and review contracts, agreements, and ordinances and advise the mayor and city council as long as citations/complaints issued by the municipality's police are handled by the county prosecuting attorney, and cases involving the city or a city police officer are heard by the court commissioner or a judge pro tem (*Washington Advisory Opinion 96-8*).<sup>6</sup>

☉ *Mark with a check any opinions from your state.*

- A part-time municipal court judge may serve as an attorney for the city board of education unless such service is prohibited by statute. *Alabama Advisory Opinion 82-131*.
- A part-time municipal judge may accept employment by an insurance

company to represent its insured, the city in which the attorney serves as judge. *Alabama Advisory Opinion 86-266*.

- A government lawyer may preside over a civil case between private litigants. *Arizona Advisory Opinion 95-8*.
- A part-time judge may serve as an attorney for a fire district located in the same town as the judge's court. *New York Advisory Opinion 88-20*.
- A part-time town justice may also serve as a full-time assistant county attorney. *New York Advisory Opinion 88-46*.
- A part-time town justice may serve as county attorney unless the employment requires numerous recusals as town justice. *New York Advisory Opinion 88-128*.
- A part-time judge may serve as a social services attorney unless the employment requires numerous recusals as town justice. *New York Advisory Opinion 91-144*.
- A part-time city judge may be retained as independent counsel by the

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<sup>6</sup> The practice of a judge simultaneously serving as the attorney for a governmental body such as a county, city, municipality, or board of education was disapproved by the Georgia committee (*Georgia Advisory Opinion 155* (1991); *Georgia Advisory Opinion 175* (1992)), but subsequently authorized by statute, as noted in a later opinion (*Georgia Advisory Opinion 183* (1993)).

city where the judge serves as a judge. *New York Advisory Opinion 96-3.*

- A part-time city judge may represent the city in which the judge sits in a contract matter. *New York Advisory Opinion 93-111.*
- A part-time judge may serve as the attorney for the village board of zoning appeals. *New York Advisory Opinion 91-90.*
- A part-time judge may practice before the zoning and planning boards in other villages and towns. *New York Advisory Opinion 96-29.*
- A part-time town justice may also serve as the village attorney for a village within the same town. *New York Advisory Opinion 97-24.*
- A part-time municipal court judge may also serve as legal counsel to the municipality's civil service commission. *Washington Advisory Opinion 89-14.*

- A part-time municipal court judge who handles only criminal cases may serve as a states attorney in the civil division. *South Carolina Advisory Opinion 13-1998.*
- A part-time municipal court judge may serve as a solicitor in a circuit that does not include the municipality for which he or she serves as a judge. *South Carolina Advisory Opinion 8-1999.*
- A part-time district court judge may accept superior court paternity cases so long as the funds used to pay for the services are not directly or indirectly from the county. *Washington Advisory Opinion 90-2.*
- A part-time judicial officer for one city within a county may perform public defender services for another city within the same county. *Washington Advisory Opinion 91-17.*



## Notes

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## ***PART-TIME JUDGES REPRESENTING CLIENTS WHEN THE GOVERNMENT IS THE ADVERSARY***

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Several judicial ethics committees have concluded that there is an appearance of a conflict, if not an actual conflict, when a part-time lawyer judge represents a client in a matter in which the opposing party is the government entity in which the judge sits.

● *Mark with a check any opinions from your state.*

- A part-time municipal court judge may not represent clients in civil suits against the city in which the judge sits. *New Mexico Advisory Opinion 89-1.*
- A part-time judge who presides over zoning violation matters may not represent clients before the zoning or planning board that covers property within the jurisdiction served by the judge's court. *New York Advisory Joint Opinion 89-44; 89-60.*
- A part-time judge may not represent a client in a real estate negotiation with the town in which the judge sits. *New York Advisory Opinion 89-85.*
- A part-time judge may not represent clients before the town planning

board within the judge's jurisdiction. *New York Advisory Joint Opinion 90-59; 90-65.*

- A part-time judge may not represent a landowner-client in the sale of land to the judge's municipality. *New York Advisory Opinion 89-59.*

*Cf., New York Advisory Opinion 89-137* (a part-time judge may represent a client in an action when the municipality in which the judge sits is a stakeholder bound by the outcome of the action).

The New York Commission on Judicial Conduct determined that removal was the appropriate sanction for a part-time town court judge who, among other misconduct, filed a petition as an attorney against the town in which he sat as a judge. *In the Matter of Assini, Determination* (New York Commission on Judicial Conduct March 4, 1999). (The judge has asked the Court of Appeals to review the Commission's determination; the court's opinion had not been issued at the time of publication of this *Guide*. For additional discussion of this case, *see* page 35, *supra*.) After the town board suspended the judge's clerk, the judge represented her in seeking an order to show cause that alleged her suspension was illegal because the board had not sought his advice and consent, and he signed an affidavit in support of the petition. When the attor-



ney for the town opposed the motion on the ground that it was improper for the judge to proceed against the municipality in which he sits as judge, the judge referred the matter to another attorney but continued to work on the case. He served a second petition for an order to show cause on the town, and he appeared, but did not argue, at oral argument on the petition. The Commission found that the judge's involvement with the lawsuit against the town demonstrated that he was not sensitive to the ethical conflicts that arose between his judicial office and personal and professional interests.

## ***OTHER CLIENTS***

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Part-time lawyer judges have been advised not to represent certain clients because they or their members are frequent litigants in the judge's court. For example, a part-time lawyer judge may not represent:

- a police chiefs' association (*New York Advisory Opinion 93-110*);
- a bail bonding company that posts bonds in the judge's municipal court (*Missouri Advisory Opinion 168* (1996));
- a residents' association located within the town served by the judge's

court (*New York Advisory Opinion 87-30*);

- an organization of police officers (*New York Advisory Opinion 91-29*);  
or
- court-appointed special advocates who provide advocacy services for children in custody and visitation disputes (*Washington Advisory Opinion 91-10*).

*Cf.*, *New York Advisory Opinion 91-106* (a part-time judge may serve as in-house counsel for an insurance company unless the company is involved in matters likely to come frequently into the judge's court); *Tennessee Advisory Opinion 90-11* (a judge may represent a large insurance company even though the representation required the judge to recuse from all traffic accident cases).

In advising that a judge could not represent a residents' association located within the town served by the judge's court, the New York judicial ethics committee explained:

It is reasonable to expect that a perception will be created that all those who appear before the lawyer-justice, who also live in the neighborhood served by the residents' association, will have an edge, be it conscious or not....

It is likely that there will be activities of the organization or of its many members that will become





# Checklist

## ***How being a part-time judge affects a lawyer's practice***

*Before undertaking representation in a new case or of a new client, a part-time lawyer judge should ask the following questions to determine if such representation is permitted by the code.*

- Did I serve as a judge in this proceeding? (See page 48).
- Did I serve as a judge in a related proceeding? (See page 52).
  - Are the parties and witnesses the same as in a proceeding in which I served as a judge?
  - Are the underlying events or many of the facts the same as in a proceeding in which I served as a judge?
  - Are issues involved in a proceeding in which I served as a judge likely to be of significance in the matter?
- Will taking the case require me to practice law in the court on which I serve? (See page 54).
  - Is the case in a court of the same class or level and within the same county or circuit as the court on which I serve? (See page 57).
  - Is the case in a type or division of court within the same county or circuit as the court on which I serve? (See page 57).
  - Is the case in a court within the jurisdiction of the judge who appointed or supervises me? (See page 57).
- Will taking the case require me to practice law in a court subject to the appellate jurisdiction of the court on which I serve? (See page 61).
- Will taking the case require me to practice law in a court that has appellate jurisdiction over the court in which I serve? (See page 61).
- Does my state allow part-time judges to represent criminal defendants? (See page 69).
  - Does this case involve a type of charge that could be brought in my court? (See page 72).
  - Will this case require me to oppose a prosecuting attorney who regularly appears before me? (See page 72).
  - Will the government be paying me for representing an indigent criminal defendant? (See page 73).

- Does my state allow part-time judges to act as prosecutors? (See page 75).
- If a potential new client is a government entity, does my state allow me to represent a government entity? (See page 82).
  - Will I be representing the government entity in a single, isolated cause of action over which I have no adjudicative jurisdiction?
  - Will the representation of the government entity be continuing and result in substantial financial impact on the my firm?
  - Will the representation of the government entity require me to give advice to the police officers that could reasonably be expected to influence the exercise of their discretion in the performance of their duties?
  - Will the representation of the government entity require me to give advice to any officer or employee that could reasonably be expected to be the subject of any action or suit before my court?
- Is the governing body of the jurisdiction in which I sit the opposing party in this case? (See page 88).
- Is this client frequently in court? (See page 89).

# SERVING AS AN ARBITRATOR OR MEDIATOR

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## IN GENERAL

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Canon 4F provides: “A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.” All categories of part-time judges are exempt from Canon 4F and may serve as arbitrators or mediators, except that a **retired judge subject to recall** may not act as an arbitrator or mediator while serving as a judge. See Application section, ¶¶ B(1) (retired judge subject to recall), C(1)(b) (continuing part-time judge), D(1)(b) (periodic part-time judge), E(1)(b) (pro tempore part-time judge).

This exemption recognizes that “the role of a neutral arbitrator is a legitimate and appropriate way for a judge who does not receive a full salary to supplement his or her income” (*D.C. Advisory Opinion 3* (1992)). Therefore, a part-time judge, including a retired judge subject to recall, may:

- handle arbitration matters that would later be reviewed by another judge of the same court (*D.C. Advisory Opinion 3* (1992));

- serve as a part-time family mediator (*Florida Advisory Opinion 98-22*);
- arbitrate a private contractual dispute (*New York Advisory Opinion 92-69*; *Utah Informal Advisory Opinion 92-1*);
- serve as an arbitrator for a private arbitration association (*New York Advisory Opinion 91-4*);
- accept an appointment by a town to serve as one of three arbitrators in a dispute with an employee (*New York Advisory Opinion 97-53*);
- serve on the committee for the state bar that resolves fee disputes between an attorney and a client (*Utah Informal Advisory Opinion 91-3*; *West Virginia Advisory Opinion* (February 5, 1997)); and
- provide services for hire in a private business as a neutral third person (*Wisconsin Advisory Opinion 98-11*).

The exemption, however, is not unconditional. A part-time judge may not serve as a mediator or arbitrator in matters in which the judge served as

judge (*Michigan Advisory Opinion JI-28* (1990)), and may not preside as a judge in matters in which the judge participated as a mediator or arbitrator (*D.C. Advisory Opinion 3* (1992); *Michigan Advisory Opinion JI-28* (1990)).<sup>7</sup> Furthermore, a part-time judge should not serve as an arbitrator or mediator with a dispute resolution agency to which the judge's court refers cases. See *New York Advisory Opinion 90-12*; *New York Advisory Opinion 91-3*; *New York Advisory Opinion 93-13*. Moreover, a part-time judge may not conduct an arbitration in the courthouse; use court employees or expend court resources for arbitration work; or work on arbitration matters during normal working hours while being paid to perform judicial duties (*D.C. Advisory Opinion 3* (1992)). Furthermore, a part-time judge may not allow arbitration duties to interfere with the prompt disposition of matters that are before the judge in a judicial capacity (*D.C. Advisory Opinion 3* (1992)).

Finally, a part-time judge must take care to avoid using the prestige of office to advance the judge's arbitration or mediation business, monitoring the advertising of any private organization with which the judge is affiliated to

make certain that it does not inappropriately exploit the judge's judicial background. For example, advertisements for the services of a part-time judge as an arbitrator or mediator should not use "Judge" or "Honorable" (*New York Advisory Opinion 96-88*; *Wisconsin Advisory Opinion 98-6R*) or include a picture of the judge in a judicial robe (*Wisconsin Advisory Opinion 97-6R*). Moreover, a part-time judge may not use official judicial stationery to advertise or solicit work as an arbitrator or mediator (*Florida Advisory Opinion 92-30*). However, the judge's judicial experience may be mentioned in advertising as long as basic biographical information is given about other non-judicial arbitrators on the organization's roster (*D.C. Advisory Opinion 3* (1992); *Utah Informal Advisory Opinion 92-1*).

## **RETIRED JUDGES SUBJECT TO RECALL**

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Many retired judges subject to recall take advantage of the exemption in Application section, ¶ (B)(1) and supplement their retirement benefits by serving as arbitrators or mediators as re-

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<sup>7</sup> The Arizona committee stated that a pro tem judge who had acted as a private mediator in a matter may, at the request of the parties and subject to the approval of the court, act as a pro tem judge to enter a judicial degree or judgement that would finalize the proceedings (*Arizona Advisory Opinion 98-6*). The committee noted that the parties stipulated that they, not the county, would pay and that the ex parte communications between the pro tem judge and each of the parties pursuant to the mediation process had been with the full knowledge, approval, and consent of all of the parties.

flected in the numerous advisory opinions that allow such service. *See Alabama Advisory Opinion 86-254; Alabama Advisory Opinion 90-392; D.C. Advisory Opinion 3 (1992); Florida Advisory Opinion 85-3; Florida Advisory Opinion 91-24; Florida Advisory Opinion 92-30; Florida Advisory Opinion 93-3; Florida Advisory Opinion 93-6; Florida Advisory Opinion 93-63; Florida Advisory Opinion 95-26; Michigan Advisory Opinion 11-28 (1990); South Carolina Advisory Opinion 18-1996; Texas Advisory Opinion 99 (1987); Wisconsin Advisory Opinion 97-6R; Wisconsin Advisory Opinion 98-6.* As noted, the exemption only applies when the retired judge is not assigned or engaged in judicial duties, and retired judges must comply with Canon 4F during the period of any judicial assignment.

The D.C. advisory committee issued an opinion addressing several issues raised when a senior judge who performs judicial duties acts as a paid arbitrator hired through a private arbitration organization. In *D.C. Advisory Opinion 3 (1992)*, the committee stated that a senior judge may serve both as an arbitrator and judge in the same jurisdiction and handle a matter as an arbitrator that might eventually come before the judge's court for confirmation, modification, or vacation of the arbitration award. Although cautioning

that a senior judge "should take particular care to ensure that his or her arbitration duties do not interfere with the ability to dispose promptly of matters which are before the judge in a judicial capacity," the committee stated that a senior judge may handle arbitration matters while he or she has judicial matters under advisement. Moreover, the committee advised that a senior judge need not take a hiatus between working as a judge and working as an arbitrator, although the committee suggested it may often be appropriate for the judge to carve out blocks of time during which he or she would perform only judicial functions or only arbitration work.

Prior to 1994, the Florida judicial ethics committee had advised that a senior judge could make a public announcement of the judge's arbitration or mediation services (*Florida Advisory Opinion 93-3*), for example, placing an ad in the local bar association monthly newsletter (*Florida Advisory Opinion 93-63*). However, in 1994, the Florida Supreme Court adopted a new code of judicial conduct that placed restrictions on a retired judge's mediation services. The new code permitted a retired judge subject to recall to serve as a mediator, place his or her name on the mediator master list maintained by the chief judge, and associate with an entity that is solely engaged in offering mediation







# Checklist

## ***Serving as an arbitrator or mediator***

*Before serving as an arbitrator or mediator in a private capacity, a part-time lawyer judge should ask the following questions to determine if the service is permitted by the code of judicial conduct.*

- Is this a matter in which I served as a judge? (See page 93).
- If I will be affiliated with a dispute resolution agency, does the court on which I serve refer cases to that agency? (See page 94).
- Will my arbitration duties interfere with the prompt disposition of judicial matters? (See page 94).
- Does the advertising for my services as an arbitrator or mediator use “Judge” or “Honorable” or my picture in a judicial robe? (See page 94).
- Is my judicial experience mentioned in advertising with more emphasis than basic biographical information given about other non-judicial arbitrators on the organization’s roster? (See page 94).
- Would it be possible and appropriate for me to carve out blocks of time during which I could perform only judicial functions or only arbitration work? (See page 95).

### **In addition, for retired judges subject to recall:**

- Will I be acting as an arbitrator or mediator while serving as a judge? (See page 94).



# SERVING AS A FIDUCIARY

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Under paragraph C(1)(b) of the application section of the 1990 model code, a **continuing part-time judge** is not required to comply with Canon 4E(1) and, therefore, unlike a full-time judge, may serve as an executor, administrator, personal representative, trustee, guardian, attorney in fact, or other fiduciary for anyone, not just family members. Therefore, a part-time judge may:

- be appointed the conservator of a protected person (*Michigan Advisory Opinion II-88* (1994));
- serve as the executor of the estates of clients (*New York Joint Opinion 90-95; 90-113 and 90-115*);
- accept an appointment as a guardian ad litem or other fiduciary from a judge of a higher court (*New York Advisory Opinion 96-108*);
- serve as the personal representative and attorney in fact for someone who is not a family member, serve as a trustee of an inter vivos trust, and hold a general durable power of attorney (*South Carolina Advisory Opinion 11-1995*);
- serve as a trustee of any kind of trust (*Tennessee Advisory Opinion 91-3*);

- serve as the executor of an estate even if it is for the estate of a non-family member and the judge has probate jurisdiction (*Tennessee Advisory Opinion 92-5*);
- as an attorney, act as a guardian ad litem in custody and/or guardianship cases (*Washington Advisory Opinion 96-8*); and

*Cf.*, *Michigan Advisory Opinion II-88* (1994) (a part-time judge may not act as a conservator of a business).

However, a **continuing part-time judge** is not exempt from compliance with Canon 4E(2) and (3), and, therefore, may act as a fiduciary *only if* (1) it is not likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge; (2) the estate, trust, or ward does not become involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction; and (3) the judge complies when acting as a fiduciary with the restrictions on financial activities that apply to the judge personally. *See* discussion at page 103, *infra*.

Moreover, the Michigan advisory committee warned that to the extent fiduciary activity “would impose on a





# Checklist

## ***Serving as a fiduciary***

*Before serving as a fiduciary, a part-time lawyer judge should ask the following questions to determine if the service is permitted by the code of judicial conduct.*

- Will my fiduciary service impose on my performance of judicial duties? (See page 99).
- Will my fiduciary service detract from the dignity of the office? (See page 100).

### **For continuing part-time judges only:**

- Is it likely that as a fiduciary I will be engaged in proceedings that would ordinarily come before me as a judge? (See page 99).
- Is it likely the estate, trust, or ward will become involved in adversary proceedings in the court on which I serve or one under its appellate jurisdiction? (See page 99).





# ***BUSINESS AND FINANCIAL ACTIVITIES***

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Like full-time judges, all types of part-time judges may hold and manage investments of the judge and members of the judge's family, including real estate (Canon 4D(2)); engage in other remunerative activity (Canon 4D(2)); and manage and participate in a business closely held by the judge or members of the judge's family or a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family (Canon 4D(3)). However, like full-time judges, they are prohibited from engaging in financial and business dealings that "may reasonably be perceived to exploit the judge's judicial position" (Canon 4D(1)(a)).

Moreover, like full-time judges, **continuing part-time judges and retired judges subject to recall** are required to manage their investments and other financial interests to minimize the number of cases in which they are disqualified (Canon 4D(4)); to divest investments and other financial interests that might require frequent disqualification as soon as the judge can do so without serious financial detriment (Canon 4D(4)); and to refrain from financial and business dealings that involve the judge in frequent transac-

tions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves (Canon 4D(1)(b)).

Therefore, a part-time judge may not:

- rent space to attorneys who practice in or are likely to come before the court on which the judge serves unless the judge disqualifies or disqualification is waived (*Arizona Advisory Opinion 95-12*);
- act as a conservator of a business (*Michigan Advisory Opinion JI-88 (1994)*);
- serve on the advisory board of a local bank that is likely to be engaged in proceedings that would ordinarily come before the judge (*South Carolina Advisory Opinion 6-1997*); or
- participate in a pyramid marketing plan that requires solicitation of customers (*South Carolina Advisory Opinion 3-1996*; *South Carolina Advisory Opinion 1-1997*).

The Louisiana Supreme Court advised that a part-time judge from a small community should not refer cases to, share representation and split fees with, or co-own a building with, an


attorney who was likely to come before the judge's court. *In re Lemoine*, 686 So. 2d 837 (Louisiana), *on rehearing*, 692 So. 2d 358 (1997). The court also stated that the judge should not rent office space to an attorney who is likely to come before the judge's court or receive a share of the attorney's fees in lieu of rent pursuant to a reciprocal fee arrangement. For additional discussion of this case, *see* pages 38-39, *supra*.

Moreover, like a full-time judge, a **retired judge subject to recall** is prohibited from serving as an officer, director, manager, general partner, advisor, or employee of any business except a business closely held by the judge or members of the judge's family or a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family (Canon 4D(3)).

However, under paragraphs C(1)(b), D(1)(b), and E(1)(b) of the code's application section, **continuing part-time judges, periodic part-time judges, and pro tempore part-time judges**, unlike

full-time judges and retired judges subject to recall, are permitted to serve as officers, directors, managers, general partners, advisors, or employees of any business; in other words, they are exempt from Canon 4D(3). *See, e.g., New York Advisory Opinion 88-97* (a town justice may serve as an officer of a corporation that will build homes and commercial buildings).

Moreover, under paragraphs D(1)(b) and E(1)(b) of the code's application section, **periodic part-time judges and pro tempore part-time judges** are not required to manage their investments and other financial interests to minimize the number of cases in which they are disqualified (Canon 4D(4)); to divest investments and other financial interests that might require frequent disqualification (Canon 4D(4)); or to refrain from financial and business dealings that involve frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which they serve (Canon 4D(1)(b)).



## Notes

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# Checklist

## ***Business and financial activities***

*To re-examine current financial or business dealings or before undertaking a new financial or business investment or relationship, a part-time lawyer judge should ask the following questions to determine if it is permitted by the code of judicial conduct.*

- Can this financial or business dealing reasonably be perceived as exploiting my judicial position? (See page 103).

### **For continuing part-time judges and retired judges subject to recall:**

- Will this investment or financial interest result in frequent disqualification? (See page 103).
- Will this financial or business dealing involve me in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which I serve? (See page 103).



# COMMUNITY INVOLVEMENT

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## IN GENERAL

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Under Canon 4A, judges are required to conduct their off-the-bench activities so that they do not cast reasonable doubt on the judge's capacity to act impartially as a judge; demean the judicial office; or interfere with the proper performance of judicial duties. Part-time judges are not exempt from Canon 4A.

Under Canon 4B of the 1990 model code, all judges, including part-time judges, may speak, write, lecture, teach, and participate in other activities on non-legal subjects or concerning the law, the legal system, and the administration of justice. Moreover, all judges are allowed to appear at a public hearing before, or otherwise consult with, an executive or legislative body or official on matters concerning the law, the legal system, or the administration of justice, or when acting pro se in a matter involving the judge or the judge's interests (Canon 4C(1)).

## GOVERNMENT COMMISSIONS OR COMMITTEES

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All judges may accept appointment to a governmental committee, commission, or position that is concerned with the improvement of the law, the legal system, or the administration of justice (Canon 4C(2)). Under paragraphs C(1)(b), D(1)(b), and E(1)(b) of the application section, **continuing part-time judges, periodic part-time judges, and pro tempore part-time judges**, unlike full-time judges and retired judges subject to recall, may also accept appointment to a governmental committee, commission, or position concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. In other words, they are not required to comply with Canon 4C (2).

Therefore, a part-time judge may:

- act as a member of an economic and industrial development district (*Louisiana Advisory Opinion 147* (1997));
- serve on a commission to establish a home rule charter for a parish (*Louisiana Advisory Opinion 20* (1975));

- serve as vice-chair of a county solid waste commission (*New York Advisory Opinion 89-155*);
- serve as a secretary to a town fire district (*New York Advisory Opinion 89-155*);
- serve as chair or member of the county's fire advisory board (*New York Advisory Opinion 89-156*);
- serve on a county agricultural and farmland districting advisory committee (*New York Advisory Opinion 94-98*);
- serve as chair of the board of directors of a regional council of government (*South Carolina Advisory Opinion 9-1987*);
- serve on the board of a county airport commission (*South Carolina Advisory Opinion 15-1997*);
- serve as a member of the county's special fire tax board (*South Carolina Advisory Opinion 25-1998*); and
- serve on the city's zoning board of adjustment (*Texas Advisory Opinion 202 (1996)*). *But see New York Advisory Opinion 96-35* (a part-time town court judge may not be a member of a village zoning or planning board where cases involving violations of

village zoning regulations are handled in the town court).

## **SCHOOL BOARDS**

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The New York advisory committee stated that a part-time judge may not run for or serve on a school board even if the election is non-partisan and the judge is unopposed. *New York Advisory Opinion 90-50*; *New York Advisory Opinion 90-63*; *New York Advisory Opinion 90-79*; *New York Advisory Opinion 96-43*. The committee explained:

Local school boards, both in urban and rural areas, are subjects of wide-spread community interest. One of their principal functions is approval of budgets and fixation of school taxes, which are subject to controversy. School board members may be at the center of such controversies and the object of public criticism.... Thus, the judge could be highly visible in educational controversies, which could be inconsistent with judicial duties.

*New York Advisory Opinion 90-79*.

If a jurisdiction prohibits public officials from holding two public offices, a part-time judge is also prohibited from serving as a member of the school board. *See In the Matter of Stern*, 589 N.W.2d 407 (Wisconsin 1999) (public reprimand for holding two offices of public trust—part-time municipal judge

and school board member—at the same time, contrary to a provision in the code of judicial conduct).

## **CHARITABLE AND LAW-RELATED ORGANIZATIONS**

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Like full-time judges, part-time judges are allowed under certain circumstances to participate in educational, religious, civic, fraternal, or charitable organizations not conducted for profit or in organizations or governmental agencies devoted to the improvement of the law, the legal system, or the administration of justice (“charitable and law-related organizations”). **Continuing part-time judges**, like full-time judges, are permitted to serve as officers, directors, trustees, or non-legal advisors *only if* the organization 1) is not likely to be engaged in proceedings that would ordinarily come before the judge, and 2) is not likely to be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member. In other words, they are required to comply with Canon 4C(3)(a).

Therefore, a part-time judge *may*:

- serve on the house committee of a Veterans of Foreign Wars Post (*New York Advisory Opinion 93-10*);
  - serve on a nursery school board, the board for a senior center, and the board of a community drug and alcohol abuse group (*New York Advisory Opinion 92-65*); and
  - serve as a director of a local non-profit hospital company if the part-time judge has jurisdiction only over traffic offenses and setting bonds in criminal cases (*South Carolina Advisory Opinion 17-1998*).
- However, a part-time judge *may not*:
- serve as a member of a local stop/DWI advisory board (*New York Advisory Opinion 91-124*);
  - continue as the treasurer of a county police association (*New York Advisory Opinion 94-85*);
  - serve on the board of directors of the Oregon Civil Liberties Union (*Oregon Advisory Opinion 82-1*);
  - serve on the board of directors of a hospital (*South Carolina Advisory Opinion 2-1998*); or
  - be a member of the board of trustees of a non-profit corporation that provides public defender services to the court when attorneys employed by that corporation appear before the judge (*Washington Advisory Opinion 92-15*).



However, unlike full-time judges and continuing part-time judges, **periodic part-time judges** and **pro tempore part-time judges** are not required to comply with Canon 4C(3)(a) and, therefore, are permitted to serve as officers, directors, trustees, or non-legal advisors of charitable and law-related organizations *even if* the organization 1) is likely to be engaged in proceedings that would ordinarily come before the judge, or 2) is likely to be frequently engaged in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of that court. See Application section, ¶¶ D(1)(b) (periodic part-time judge), E(1)(b) (pro tempore part-time judge).

Like full-time judges, **continuing** and **periodic part-time judges** may not personally participate in the solicitation of funds or other fund-raising activities, including being a speaker or guest of honor at a fund-raising event, except that a judge may solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority. In other words, continuing and periodic part-time judges must comply with Canon 4C(3)(b)(i). Like full-time judges, continuing and periodic part-time judges may assist a charitable or law-related organization in planning fund-raising and participate in the management and investment of the organization's funds (Canon 4C(3)(b)(i)).

Therefore, a part-time judge:


- may be treasurer of a community Independence Day parade if that responsibility is limited to depositing proceeds and paying bills but may not participate in any capacity in the sale of raffle tickets or the promotion of concessions (*New York Advisory Opinion 92-36*);
- may serve on a nursery school board, but may not sell tickets for the school's fund-raising carnival (*New York Advisory Opinion 92-65*);
- may serve on the board for a senior center and wait tables at a pancake breakfast (*New York Advisory Opinion 92-65*);
- may cook and serve hamburgers at a church fund-raising function where the food is available only for the convenience of those attending and the price charged produces no profit, but may not supervise the fund-raising affair or judge the greased pole and lumberjack contests (*New York Advisory Opinion 90-28*);
- may not permit his name to be used as honoree and sponsor of "A champagne evening with Dionne Warwick" to raise funds for a voter education program (*Louisiana Advisory Opinion 34* (1976));

- may not, as a member of the board of directors of a symphony orchestra, recruit, instruct, and monitor the activities of individuals raising funds and make weekly status reports to the fund-drive chair (*New York Advisory Opinion 92-100*);
- may not present an award during a fund-raising dinner (*New York Advisory Opinion 90-98*);
- may not be the honoree at a charitable fund-raising dinner but may attend such an event (*New York Advisory Opinion 91-138*);
- may serve on a college committee whose purpose is to establish an endowment fund, provided the judge's name and title are not involved in the solicitation of gifts (*New York Advisory Opinion 92-117*);
- may not write a letter on behalf of a community resource center in its

efforts to obtain a grant (*South Carolina Advisory Opinion 23-1996*);

- may serve on the community relations board of a federal correctional institution (*South Carolina Advisory Opinion 15-1995*); and
- may serve at fund-raising events in a generic capacity such as collecting tickets at a football game or working in a concession stand during a school activity (*West Virginia Advisory Opinion* (November 3, 1995)).

Unlike full-time judges, continuing part-time judges, and periodic part-time judges, **pro tempore part-time judges** may personally participate in the solicitation of funds or other fund-raising activities; in other words, pro tempore part-time judges do not have to comply with Canon 4C(3)(b)(i). See Application section, ¶ E(1)(b).



## Notes

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# Checklist

## ***Community involvement***

*To re-examine current participation in charitable or law-related organizations or before undertaking a new involvement, a part-time lawyer judge should ask the following questions to determine if it is permitted by the code of judicial conduct.*

### **For continuing and periodic part-time judges:**

- Will I be personally participating in the solicitation of funds or other fund-raising activities other than soliciting funds or memberships from judges over whom I do not exercise supervisory or appellate authority? (See page 110).
- Will I be a speaker or guest of honor at a fund-raising event? (See page 110).

### **In addition, for continuing part-time judges:**

- Is this charitable or law-related organization likely to be engaged in proceedings that would ordinarily come before me? (See page 109).
- Is this charitable or law-related organization engaged frequently in adversary proceedings in the court of which I am a member or in any court subject to the appellate jurisdiction of the court of which I am a member? (See page 109).

# POLITICAL ACTIVITIES

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## IN GENERAL

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Under Canon 5A(1) of the 1990 model code, a full-time judge is prohibited from engaging in a wide range of political activity, including acting as a leader or holding an office in a political organization; publicly endorsing or opposing a candidate for public office; making speeches on behalf of a political organization; attending political gatherings; soliciting funds for, paying an assessment to, or making a contribution to a political organization or candidate; and purchasing tickets for political party dinners or other functions. Some of those restrictions are lifted, however, under Canon 5C(1), for a judge who is subject to public election. At any time, he or she may purchase tickets for and attend political gatherings, identify as a member of a political party, and contribute to a political organization. When the judge is a candidate for election, he or she may speak to political gatherings on the judge's own behalf and publicly endorse or publicly oppose other candidates for the same judicial office.

Under paragraphs C(1)(b) and D(1)(b) of the application section of the 1990 model code, **continuing part-time**

**judges** and **periodic part-time judges** are not required to comply with Canons 5A(1), 5B(2), and 5D.

However, the Tennessee judicial ethics committee stated that the general code restrictions on a judge's non-judicial endeavors in Canon 4 provide valuable guidance for appropriate political conduct for part-time judges (*Tennessee 99-2*). The committee concluded that those general restrictions prohibit a part-time municipal judge from serving as the chair of a presidential candidate's local campaign despite the inapplicability of the specific code restrictions on political activity.

Moreover, unlike the 1990 model code, the 1972 model code did not exempt part-time judges from the code restrictions on political activity. Many states still require part-time judges to comply with the political restrictions either because they have not yet adopted the 1990 model code or because they have chosen as a matter of policy to restrict part-time judges' political activities to the same extent as full-time judges.

For example, although Florida, Georgia, New Hampshire, New York, Ohio, Texas, and Washington have adopted many provisions from the 1990 model

code, they have not adopted its exemptions for part-time judges from the prohibitions on political activity, and part-time judges are required to comply with those provisions of the code. In those states, as well as in others that have not adopted the 1990 model code exemptions, a part-time judge may not act as a leader or hold any office in a political organization (Canon 5A(1)(a)) and, therefore, may not:

- be a committee member and area chair for a political party (*New York Advisory Opinion 90-8*; *New York Advisory Opinion 96-29*);
- serve as a member of the state or county executive committee of a political party (*Ohio Advisory Opinion 98-8*); or
- serve as a member of a county board of elections (*Ohio Advisory Opinion 98-8*).

Moreover, in those states, a part-time judge may not publicly endorse or publicly oppose another candidate for public office (Canon 5A(1)(b)), and therefore, may not:

- act as treasurer of the campaign committee formed to help re-elect

another judge (*Georgia Advisory Opinion 123* (1988));

- give permission to the re-election campaign committee of a congressman to use a photograph of the part-time judge and the congressman as part of the later's re-election campaign (*New York Advisory Opinion 88-113*);
- serve on a committee to re-elect a supreme court justice (*New York Advisory Opinion 95-119*);
- serve on a labor union's political action committee (*New York Advisory Opinion 96-10*); or
- publicly endorse a candidate for prosecuting attorney (*Washington Advisory Opinion 93-9*).<sup>8</sup>

Moreover, in those states, a part-time judge may not make speeches on behalf of a political organization or attend political gatherings (Canon 5A(1)(c)(d)), and, therefore, may not:

- attend social functions or meetings at a political club or attend political fund-raisers (*New York Advisory Opinion 89-113*);
- attend a picnic sponsored by a political party unless the judge is running

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<sup>8</sup> Under the Washington code, both full-time judges and part-time judges may endorse candidates for judicial office. Therefore, in Washington, a judge pro tempore may publicly endorse a candidate for judicial office (*Washington Advisory Opinion 93-21*) and be listed as campaign committee member on letterhead of a judicial campaign letter soliciting endorsements and/or financial contributions (*Washington Advisory Opinion 93-21*).

for re-election (*New York Advisory Opinion 90-11*); or

- attend a political fund-raising event for local non-judicial candidates (*Washington Advisory Opinion 90-11*).

Furthermore, in states that have not adopted the exemptions from the 1990 model code, a part-time judge may not solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate, or purchase tickets for political party dinners or other functions (Canon 5A(1)(e)). Therefore, a part-time judge may not:

- make a political contribution (*Florida Advisory Opinion 94-8*);
- give legal advice to a political party committee without charge (*New Hampshire Advisory Opinion 82-1*);
- make a contribution to a political action committee established by the judge's non-judicial employer (*New York Advisory Opinion 89-55*);
- make contributions to any political candidate (*New York Advisory Opinion 96-29*); or
- participate in fund-raising activities (*Washington Advisory Opinion 94-2*).

In states where a part-time judge is prohibited from contributing to a politi-

cal campaign, a law firm may not contribute to a political campaign in the firm's name or using partnership funds if a part-time judge is a partner or associate. See *Florida Advisory Opinion 90-26*; *New York Advisory Opinion 88-56*; *New York Advisory Opinion 96-94*; *New York Advisory Opinion 96-29*. Nor may a part-time traffic magistrate make a political contribution as a professional association (*Florida Advisory Opinion 94-8*). However, a part-time judge's law partner may make political contributions in his or her name from personal funds (*Florida Advisory Opinion 90-26*).



## ***RUNNING FOR ANOTHER OFFICE***

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### ***Running for a non-judicial office***

Canon 5A(2) requires a judge to “re-sign from judicial office upon becoming a candidate for a non-judicial office either in a primary or in a general election.” **Pro tempore part-time judges** are exempt from this requirement. However, **continuing part-time judges, periodic part-time judges, and retired judges subject to recall** are required to resign if they become a candidate for a non-judicial office.

Thus, for example, a part-time judge must resign if he or she becomes a candidate for:

- a sanitation district board (*Arizona Advisory Opinion 82-1*);
- a charter committee (*Arizona Advisory Opinion 95-16*);
- county attorney (*Kansas Advisory Opinion JE-4*);
- a board of supervisors (*Mississippi Commission on Judicial Performance*

*v. Haltom*, 681 So. 2d 1332 (Mississippi 1996));

- a school board (*New York Advisory Opinion 90-63*; *Washington Advisory Opinion 85-8*);
- a village board (*New York Advisory Opinion 91-06*); or
- district attorney general (*Tennessee Advisory Opinion 90-5*).

See *New York Advisory Opinion 90-2* (a part-time judge may run for election to a local library board because it is a non-political, non-governmental office and the election is not a primary or general election).<sup>9</sup>

### ***Running for another judicial office***

Part-time judges, like full-time judges, may run for a different *judicial* office without resigning their current position. However, a part-time judge may not use the title “judge” in campaign literature without explaining the limited nature of his or her current position (*Arizona Advisory Opinion 98-*

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<sup>9</sup> California, Georgia, and Texas have not adopted the resign-to-run requirement for either full-time or part-time judges; Idaho requires judges to obtain a leave of absence when running for a non-judicial office but does not require resignation. In those states, full-time and part-time judges may run for a non-judicial office without resigning. In fact, some authorities allow part-time judges to serve in other public offices. See *Georgia Advisory Opinion 230* (1998) (a part-time municipal court judge may serve as member of the general assembly). Cf., *In the Matter of Niemi*, 820 P.2d 41 (Washington 1991) (a judge pro tempore may serve as a state senator). However, the Georgia committee cautioned that while campaigning for a non-judicial position, a part-time judge should not “be publicly identified as a Judge in campaign literature, newspaper advertisements, or media appearances,” that “the prestige of the judicial position must never be misused, traded upon, nor allowed to become embroiled in political controversy,” and that the part-time judge “should not preside or otherwise serve as Judge during the course of the campaign” (*Georgia Advisory Opinion 230* (1998)).



3). Failure to mention the candidate's part-time status while using the title "judge" is misleading, and Canon 5A(3)(d)(iii) prohibits a judicial candidate from "knowingly misrepresent[ing] the identity, qualifications, present position or other fact concerning the candidate...."

- A lower court part-time judge campaigning for superior court may use the term "judge" and a photograph of himself or herself seated on the bench wearing judicial robe if the judicial position the candidate currently holds is clearly specified. *Georgia Advisory Opinion 167 (1992)*.
- A part-time associate judge campaigning for probate judge may use the title "associate judge" but not "judge" in campaign literature. *South Carolina Advisory Opinion 7-1998*.

Like full-time judges and other judicial candidates, when campaigning for judicial office, a part-time judge is required to comply with Canon 5A(3)(a) and, therefore, must maintain the dignity appropriate to judicial office, act in a manner consistent with the integrity and independence of the judiciary, and encourage members of the judge's family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate. Judicial candidates, including part-time

judges, must also prohibit employees and officials who serve at the pleasure of the candidate from doing on the candidate's behalf what the candidate is prohibited from doing and discourage employees and officials subject to the candidate's direction and control from doing on the judge's behalf what the judge is prohibited from doing (Canon 5A(3)(b)). Judicial candidates shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing, though the candidate may authorize a committee to raise funds and solicit publicly stated support (Canon 5A(3)(b)). Part-time judges, like other judicial candidates, shall not, when running for judicial office, make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; make statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court; or knowingly misrepresent the identity, qualifications, present position, or other facts concerning the candidate or an opponent (Canon 5A(3)(d)). Finally, under the model code, judicial candidates including part-time judges shall not personally solicit or accept campaign contributions, personally solicit publicly stated support, use or permit the use of campaign contributions for

the private benefit of the candidate or others, or permit his or her campaign committee to solicit contributions and public support earlier than one year before and later than 90 days after the election (Canon 5C(2)).



# Checklist

## *Political activities*

	Never permitted	Always permitted	Sometimes permitted
Acting as a leader in a political organization	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Holding office in a political organization	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Making speeches for a political organization	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Soliciting funds for a political organization	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Paying an assessment to a political organization	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Making a contribution to a political organization	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Making speeches for a political candidate	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Endorsing a candidate for public office	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Endorsing a candidate for judicial office	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Soliciting funds for a political candidate	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Making a contribution to a political candidate	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Attending political gatherings	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Speaking at political gatherings	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Purchasing tickets for political party functions	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Becoming a candidate for election for a non-judicial office	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

## Self-Test—Answers

*Judge David Perry is a continuing part-time judge who sits one-day a week in the 16th District Court of the 5th Judicial Circuit located in Sampson County. His duties include issuing warrants, arraigning defendants charged with felonies, and presiding over misdemeanor and small claims cases.*

1. At the opening of a court session, he asks whether any person having business before the court has any relationship to him or his law firm, Perry and Berg. Four people come forward. **Is he disqualified from a case:**

1a. If his partner Karen Berg is currently representing the defendant in a probate case that has no relation to the criminal charges before Judge Perry?

Yes: see discussion at page 24.

No

1b. If Judge Perry is currently representing the arresting police officer in a civil rights case that is unrelated to the criminal charges before him?

Yes: see discussion at page 26.

No

1c. If Judge Perry represented the defendant now charged with assault one time, five years earlier in a routine real estate closing?

Yes

No: see discussion at page 27.

1d. If Judge Perry represented the defendant, now charged with murder, on several criminal charges, including aggravated assault, over a period of five years, when the representation ended a year earlier and the current charges arise out of different events?

Yes: given the length of the attorney-client relationship, its proximity to the current case, the seriousness of the previous charges, and their similarity to the current case, disqualification is probably required; see discussion at page 27.

No

2. Jennifer Morris represents the defendant in a misdemeanor case ready for trial. **Is Judge Perry disqualified from the case:**

2a. If Morris is an associate of a firm in which Judge Perry is a partner?

Yes: see discussion at page 31.

No

2b. If Morris is of counsel to a firm in which Judge Perry is employed as an associate?

Yes: see discussion at page 31.

No

2c. If Judge Perry shares office space with Morris, although they are not associated in the practice of law?

Yes: see discussion at page 35.

No

2d. If Judge Perry has a fee sharing agreement with Morris in unrelated cases?

Yes: see discussion at page 37.

No

2e. If Judge Perry is co-counsel to Morris in pending cases?

Yes: see discussion at page 39.

No

2f. If Judge Perry and Morris are both part-time public defenders?

Yes: see discussion at page 39.

No

2g. If Morris is opposing counsel to Judge Perry in an unrelated action in another court?

Yes

No: see discussion at page 42.

3. At the request of the police, Judge Perry issued a search warrant for premises occupied by Nancy Brill, who is arrested based on evidence discovered during the search and charged with arson. Subsequently, Brill asks Perry to represent her as an attorney in the criminal case, which has been assigned to another judge.

3a. May Perry represent her?

Yes

No: see discussion at page 48.

3b. May his partner Karen Berg represent her?

Yes

No: see discussion at page 53.

4. Judge Perry presides in a case in which Peter Lange was charged with disorderly conduct. The owner of the store that Lange damaged during the incident visits Perry's law office and asks Perry to represent him in a civil action against Lange. May he do so?

Yes

No: see discussion at page 52.

5. May Perry represent a client in:

5a. The 12th District Court of the 5th Circuit?

Yes

No: see discussion at page 57.

5b. The 10th District Court of the 6th Circuit?

Yes: see discussion on page 57.

No

6. A client asks Judge Perry to defend him in a criminal case in a court other than one in which he serves. May he take the case?

Yes: see discussion at page 69.

No

7. Karen Berg suggests to Perry that they begin to concentrate the practice of their firm on criminal cases, including misdemeanors and cases in which the state will be represented by the assistant prosecutor that appears in Judge Perry's courtroom. Should he agree to that proposal?

Yes

No: see discussion at page 72.

8. Sampson County asks Judge Perry to act as a part-time prosecutor. May he take the position?

Yes

No: in most states; see discussion at page 75.

9. Sampson County asks Judge Perry to be the county attorney. He would not prosecute cases but would review contracts, help draft ordinances, and give legal advice to the county and its employees, including the sheriff's department. May he take the county as a client?

Yes: in most states; see the discussion at page 82.

No

10. A client who has slipped and fallen on the sidewalk in front of a county building asks Judge Perry to represent him in a suit against Sampson County. Should he take the case?

Yes

No: see discussion at page 88.

11. May Judge Perry represent a bail bonding company that posts bonds in his court?

Yes

No: see discussion at page 89.

12. ADR Systems of Sampson County, a private agency, asks Judge Perry to serve on its staff of arbitrators. May he accept the position?

Yes: see discussion at page 93.

No

14. ADR Systems shows Judge Perry a proposed brochure with pictures of its arbitrators, including one of Perry in his robes and identified as "The Honorable David Perry." His part-time judicial service is noted as part of his biographical information in a format similar to that of the other arbitrators for the agency.

13a. Should he approve the brochure?

Yes

No: see discussion at page 93.

13b. If the picture of him in his robes and the "Honorable" are removed, may he approve the brochure?

Yes: see discussion on page 93.

No

14. Jean Baldwin, a client to whom Judge Perry is not related, asks him to serve as the executor of her estate. May he do so?

Yes: see discussion at page 99.

No

14a. After Baldwin's death, Perry begins to act as executor. The estate becomes embroiled in a dispute involving some of the real estate that is one of the assets of the estate, and a suit is filed in the 16th District Court of the 5th Judicial Circuit for Sampson County. May he continue to act as executor?

Yes

No: see discussion at page 99.

15. Judge Perry presides and practices in the small town of Merrillville.

15a. May he purchase a building with Karen Berg, one of the other attorneys in Merrillville with a litigation practice?

Yes

No: see discussion at page 103.

15b. May he agree to share representation and split fees with Berg?

Yes

No: see discussion at page 103.

15c. May he rent office space in a building he owns to Berg?

Yes

No: see discussion at page 103.

16. There is an opening on the Sampson County Economic and Industrial Development Commission after a local attorney resigns upon becoming a full-time judge. May Judge Perry accept an appointment to the commission?

Yes: see discussion at page 107.

No

17. Judge Perry has been a member of the school board for many years, winning the position in non-partisan elections that have never been contested. May he continue to serve after becoming a part-time judge?

Yes

No: see discussion at page 108.

18. May Judge Perry serve on the board for a senior center?

Yes: see discussion at page 109.

No

19. May Judge Perry continue as the treasurer of a county police association?

Yes

No: see discussion at page 109.

20. May Judge Perry be a member of the board of trustees of a non-profit corporation that provides public defender services to his court?

Yes

No: see discussion at page 109.

21. May Judge Perry be treasurer of a community Independence Day parade responsible for depositing proceeds and paying bills?

Yes: see discussion at page 110.

No

22. May Judge Perry sell raffle tickets or promote concessions at a fund-raiser for a community Independence Day parade?

Yes

No: see discussion at page 110.

23. May Judge Perry receive an award during a fund-raising dinner for a senior center for which he is a board member?

Yes

No: see discussion at page 110.

23a. If he is a pro tempore part-time judge, may Judge Perry receive an award during a fund-raising dinner for a senior center for which he is a board member?

Yes: see discussion at page 111.

No

24. May Judge Perry serve as a member of the state or county executive committee of a political party?

Yes: under the 1990 model code, but many states have not adopted that exemption; see discussion at page 113.

No

25. May Judge Perry attend fund-raising functions for a candidate for county commissioner?

Yes: under the 1990 model code, but many states have not adopted that exemption; see discussion at page 113.

No

26. May Judge Perry's law firm, Perry and Berg, make contributions to a political candidate in the firm name?

Yes: under the 1990 model code, but many states have not adopted that exemption; see discussion at page 113.

No

27. May Karen Berg make a contribution to a political organization in her own name?

Yes: see discussion at page 113.

No

28. Judge Perry would like to run for city council. Must he resign from his part-time judgeship?

Yes: see discussion at page 116.

No

29. Judge Perry would like to run for a full-time judge position. Must he resign from his part-time judgeship before becoming a candidate?

Yes

No: see discussion at page 116.

30. While running for another judicial office, may Judge Perry use the title "judge" in campaign literature?

Yes: if the literature clearly indicates that he has served only as a part-time judge; see discussion at page 116.

No