

The Supreme Court of Texas

Professional Ethics Committee

*1 Opinion Number 541

February 2002

QUESTIONS PRESENTED

May a municipal court judge represent a person accused of a crime where (1) the judge/lawyer has not acted in the matter in his position as judge, and (2) where the police in that city are or may be potential witnesses in the trial of that case?

STATEMENT OF FACTS

A municipal court judge seeks to represent a criminal defendant in a matter in which he has not acted in a judicial capacity, but in which the city's police may be potential witnesses.

DISCUSSION

Resolution of these issues requires examination of Rule 1.06(b) and (c), and Rule 1.11 of the Texas Disciplinary Rules of Professional Conduct, since these rules impose obligations upon a lawyer who, while acting as a municipal court judge, concurrently practices law. Rule 1.06 provides, in part:

(b) ... except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or

(2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

(c) A lawyer may represent a client in the circumstances described in (b) if:

(1) the lawyer reasonably believes that the representation of each client will not be materially affected; and

(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

Rule 1.11 provides, in part:

(a) A lawyer shall not represent anyone in connection with a matter in which the lawyer has passed upon the merits or otherwise participated personally and substantially as an adjudicatory official ... unless all parties to the proceeding consent after disclosure.

As presented to this Committee, the facts are simple. A municipal court judge seeks to represent a criminal defendant in a matter in which he has not acted in a judicial capacity, but in which the city's police may be potential witnesses.

Rule 1.06(b)(2) provides that a conflict of interest may exist if the representation of the criminal defendant either "become[s] adversely limited" or "reasonably appears to be ... adversely limited by the lawyer's or law firm's responsibilities to another client or ... third person or by the lawyer's or law firm's own interests." The municipal court judge's dual role as judge and advocate would therefore pose a potential conflict of interest.

Notwithstanding this potential conflict, Rule 1.06(c) provides that the lawyer may represent the criminal defendant if, after assessing the potential conflict "(1) the lawyer reasonably believes that the representation of each client will not be materially affected; and (2) each affected or potentially affected client consents ... after full disclosure of the existence, nature, implications and possible adverse consequences of the ... representation" Comment 8 to Rule 1.06 states that "[d]isclosure and consent are not formalities. Disclosure sufficient for sophisticated clients may not be sufficient to permit less sophisticated clients to provide fully informed consent." Comment 4 states that a "client's consent to the representation ... [will be] insufficient unless the lawyer also believes that there will be no materially adverse effect upon the interests of either client."

*2 In addition to the general rule on conflicts of interest, Rule 1.11 addresses conflicts of interest with regard to adjudicatory officials and law clerks. Specifically, Rule 1.11(a) prohibits lawyers from "represent[ing] anyone in connection with [any] matter in which the lawyer has passed upon the merits or otherwise participated personally and substantially as an adjudicatory official ... unless all parties ... consent after disclosure." Pursuant to Rule 1.11(a), therefore, a municipal court judge would be disqualified from defending a criminal defendant in any case where the judge acted in a judicial capacity, or which is substantially related to a matter heard as a judge, unless the disclosure and consent requirements of Rule 1.11(a) are otherwise met.

Under Rule 1.11(a) and Rule 1.06(b)(2), therefore, a part-time (or full-time) municipal court judge would have a conflict of interest if he represents a criminal defendant (i) in connection with any matter in which he has passed upon the merits or otherwise participated personally and substantially as an adjudicatory official; or (ii) where the client's representation would be adversely limited by the lawyer's/law firm's responsibilities to another client or third party, or by the lawyer's/law firm's own interests.

Pursuant to Rule 1.11(a) and 1.06(c)(2), the judge would have to obtain the client and the municipality's consent, after full disclosure, in order to be able to undertake the representation. Further, Rule 1.06(c)(1) imposes the additional obligation that the judge reasonably believe that the representation of each client/party would not be materially affected, prior to undertaking such representation. The municipal court judge would not have a conflict under either Rule 1.06(b)(2) or 1.11(a) if he defended criminal matters in a city or jurisdiction other than where the attorney acts as a judge.

Opinion 429, December 1985, held that a practicing attorney, who is also a part-time associate city judge, should not represent a person accused of a crime if the city's police were or could be potential witnesses in the trial of that case. The Committee's rationale for Opinion 429 was the fact that a parttime city judge must maintain a neutral role when city policemen testify in municipal court; and in representing a criminal defendant, the attorney/part-time judge would have little alternative but to adopt an adversarial role towards those same policemen. The Committee was also concerned that the attorney's independent professional judgment in behalf of his private client could be adversely affected by his part-time role as a judge.

Although Opinion 429 was published prior to the adoption of the current Texas Disciplinary Rules of Professional Conduct, it has been cited by more recent opinions. One example is Opinion 497, August 1994, which relies on Opinion 429 in concluding that a city commissioner's representation of criminal defendants in the county and district courts where the commissioner appoints judges (and where the commissioner appoints the city manager who, in turn, controls the police department and police officers acting as witnesses in criminal cases) would create a conflict of

interest, subject to Rule 1.06(b) and (c).

*3 In Opinion 497, the Committee opined that the city commissioner (like the judge in the prior case) is a public officer, and as such is held to a high standard of integrity. The Committee also noted that "[h]aving an attorney who is a city commissioner involved in [the] representation of criminal defendants in [cases in] which employees of the city are involved creates a conflict between the client's interests and the city's interests" Opinion 497. The Committee, however, found that notwithstanding such a conflict, the lawyer could represent both the client and the city if the lawyer reasonably believes that the representation of each party would not be materially affected; and each affected or potentially affected party consents after full disclosure.

Similarly, in Opinion 530, October 1999, the Committee addressed whether an elected county commissioner could practice law in the justice, statutory county and district courts in Dallas County. Citing Opinion 497, the Committee held that representation of a private client in any justice, statutory county or district court in Dallas County would create a conflict of interest absent disclosure and consent, and would be subject to the requirements of Rule 1.06(b) and (c).

CONCLUSION

A municipal court judge may not represent a criminal defendant (i) in any proceeding where he has passed upon the merits, (ii) in any matter where he has otherwise participated personally and substantially as an adjudicatory official, (iii) in any court on which the judge currently serves, or (iv) where the city's police may be witnesses (or potential witnesses) in the trial of a case, unless the client and municipality give appropriate consent, after full disclosure, in accordance with Rules 1.06(c) and 1.11(a) of the Texas Disciplinary Rules of Professional Conduct. Rule 1.06(c)(1) imposes the additional obligation that the judge reasonably believe that the representation of each client/party not be materially affected, prior to undertaking such representation. This Committee expresses no opinion on whether such representation would be permissible under the Texas Code of Judicial Conduct.