



ADVISORY COMMITTEE ON PROFESSIONAL ETHICS
Appointed by the Supreme Court of New Jersey

OPINION 728

**Municipal Court Judges Who Engage in
Private Practice of Law May Share in Legal
Fees Generated by Partners or Associates in
Out-of-County Criminal Matters;
Superseding Opinion 559**

The Advisory Committee on Professional Ethics received an inquiry from a part-time municipal court judge who has a private law practice with one associate. The associate represents defendants in criminal and motor vehicle matters in counties other than the county in which the municipal court judge sits. ACPE Opinion 559 (1985) states that the municipal court judge may not share in any fees generated by the firm's criminal practice. Inquirer asked if this prohibition is still good law.

Rule 1:15-1(b) provides that a lawyer who is a part-time municipal court judge "shall not practice in any criminal, quasi-criminal or penal matter" *Rule 1:15-4(b)* provides that partners and associates of lawyers who are part-time municipal court judges are similarly prohibited from practicing in any criminal, quasi-criminal, or penal matter but the prohibition extends only to the county in which the court of the municipal court judge is located. Accordingly, partners and associates of lawyers who are part-time municipal

court judges may represent defendants in criminal and motor vehicle matters in counties other than the county in which the municipal court judge sits.

In Opinion 559, the Committee found that the part-time municipal court judge could not share in fees generated by the partner or associate's criminal practice. The Committee reasoned: "To permit the sharing of such fees would nullify the whole purpose of the Rule. Such conduct could easily lead to the belief that, while the associate is practicing criminal law outside of the county in which the judge sits, nevertheless, his association with the judge and the latter's relationship with other judges hearing criminal court matters might give some advantage to the judge's partner or associate." The Committee further relied on Opinion 359 (1976), concerning a municipal court judge sharing office space with a municipal prosecutor. The municipal prosecutor can practice criminal defense law in other counties. The Committee found that it would be improper for the two lawyers to share office space because the judge would share in, or benefit from, "the fees from practice forbidden him under the rule." The findings in these Opinions are clearly based on the appearance of impropriety; sharing in fees could lead people to believe that the judge's associate has an advantage in the case. The appearance of impropriety doctrine, however, was deleted from the *Rules of Professional Conduct* in 2004.

The Committee now reconsiders the reasoning of Opinion 559. The starting point is *Rule* 1:15-1(b), which prohibits part-time municipal court judges from engaging in a criminal or quasi-criminal practice, and *Rule* 1:15-4(b), which permits a municipal court judge's partner or associate to engage in a criminal practice in counties other than that in which the judge sits. These *Rules* are silent regarding the allocation of fees within the firm generated by the criminal practice of the partners and associates.

While conflicts of one lawyer are generally imputed to the entire firm, *Rule of Professional Conduct* 1.10(a), there are situations where one lawyer in a firm is prohibited from representing a client in a matter while other lawyers in the firm may do so. A lawyer who is disqualified from representing a client due to a personal interest is screened from the case but is not expressly prohibited from sharing in the fee earned by the firm. *RPC* 1.10(a).

In contrast, *Rule of Professional Conduct* 1.10(c) expressly prohibits a lawyer from sharing in fees generated by the firm's representation of clients in certain matters. Specifically, a lawyer who switches firms and is prohibited from representing a client at the new firm, because the lawyer's former firm represents the adverse party in the same matter, can be "apportioned no part of the fee" generated by the new firm's continuing representation of its client.¹ *RPC* 1.10(c)(2). Side-switching lawyers are treated differently; the client presumably is comforted by the fact that the lawyer who previously worked at the adverse firm is screened from the case *and* is apportioned no part of the fee.

The Committee, in Opinion 559, reasoned that if the disqualified lawyer, the municipal court judge, shared in the fee, the public would believe that the firm has an advantage in these out-of-county criminal matters. But *Rule* 1:15-4(b) allows the judge's law firm to appear in such matters. The lawyer handling the matter uses letterhead presumably listing the judge's name as associated with the firm; the judge may even be a

¹ The disqualified lawyer in this circumstance cannot have had primary responsibility to represent the adverse party while at the prior firm. *RPC* 1.10(c)(1). If the disqualified lawyer had primary responsibility for the matter at the prior firm, the lawyer's new firm may not continue to represent its client and must withdraw from the case. *RPC* 1.9(b)(2).

name partner in the firm.² *Rule* 1:15-4(b) does not require that the judge’s association with the lawyer appearing in the case be hidden. The Committee finds it difficult to rationalize why the internal allocation of fees, by itself, would cause the public to believe that the law firm has an undue advantage in such cases. The Committee cannot, as it did in Opinion 559, rely on the appearance of impropriety to support a restriction on sharing of fees within a law firm in these circumstances.

The Committee has recently been instructed by the Supreme Court that prohibitions on the practice of law must be supported by solid, sensible facts and the Committee should not rely on the “mere possibility” of harm to support a restriction. *In re Opinion No. 17-2012 of the Advisory Committee on Professional Ethics*, ___ N.J. ___ (July 2, 2014) (2014 N.J. Lexis 652, p. *34). The Court, by *Rule*, permits a partner or associate of a part-time municipal court judge to represent a client in a criminal matter outside the county, even though such practice arguably may lead some people to believe that the lawyer in the judge’s law firm has an advantage in the case. The internal allocation of the fee amongst the lawyers in the firm does not, by itself, spark a public perception that the representation by the judge’s partner or associate is unfair.

Accordingly, the Committee hereby overrules Opinion 559. Part-time municipal court judges may share in fees generated by their partners or associates who represent parties in criminal, quasi-criminal, or penal matters outside the county in which the judge sits.

² The *Rules of Professional Conduct* do not prohibit a part-time municipal court judge who has a private law practice from being included in the law firm name or using firm letterhead that lists the judge’s name, provided there is no mention of the judge’s status as a municipal court judge.