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FORMAL ADVISORY OPINION #03-96
OCTOBER 30, 1996

QUESTION PRESENTED

May a per diem district court judge and the lawyers in the law firm of that per diem judge practice in district court?

DISCUSSION

I. A PER DIEM DISTRICT COURT JUDGE IS PROHIBITED FROM PRACTICING AS A LAWYER IN ANY DISTRICT COURT WITHIN THE CIRCUIT THE JUDGE SITS AS A PER DIEM DISTRICT JUDGE

Section B(1)(b) of the application section of the Hawaii Code of Judicial Conduct exempts part-time judges from Canon 4G's prohibition on a judge practicing law. However, Section B(2) adds the condition that a part-time judge "shall not practice law in the court on which the judge serves."

The rationale for that proscription is that the part-time judge's inherent problem of keeping the role of judge completely separate from the role of practicing attorney is insurmountable when the judge practices in his or her own court before judges to whom he or she is also a colleague and interacting with court staff to whom he or she is also a supervisor. Such practice would put a part-time judge in the position of having an advantage in cases in which he or she is involved as an attorney, or at least of appearing to have such an advantage.

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For purposes of applying the prohibition of Section B(2), this Commission views the "court" in which a per diem judge serves, as the district court of the entire judicial circuit in which the district court is established. See H.R.S. § 604-1 (district court); H.R.S. § 571-8 (district family court).

Therefore, a per diem district court judge is prohibited from practicing law in the district courts in the county or circuit in which the judge sits.

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. A per diem judge may also practice as an attorney within the county or circuit the judge sits, in all levels of the courts other than district court. However, the Commission emphasizes that a part-time judge must be careful to ensure that representation as an attorney in a specific case does not violate any duty imposed by the Code of Judicial Conduct. Under Canon 2A, a part-time judge is required to conduct himself or herself, even while acting as an attorney, "in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Part-time judges should keep in mind when they are considering taking a case and when they appear as attorneys in other courts, the requirements of Canon 2B:

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.

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Similarly, the Commission reminds part-time judges of the following code requirements.

Canon 4A: A judge shall conduct all of the judge's extra-judicial activities so that they do not: (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; (2) demean the judicial office; or (3) interfere with the proper performance of judicial duties.

Canon 3A: The judicial duties of a judge take precedence over all the judge's other activities.

Canon 3B(11): A judge shall not disclose or use, for any purpose, unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

Canon 3E(1): A judge shall disqualify himself or herself in a proceeding in a which the judge's impartiality might reasonably be questioned. . . .

These provisions are not any of those from which part-time judges are exempt, and the duties they impose apply to part-time judges to the same extent as full-time judges.

II. A PER DIEM JUDGE SHOULD NOT ALLOW LAWYERS IN THE JUDGE'S LAW FIRM TO PRACTICE IN THE DISTRICT COURT WITHIN THE CIRCUIT THE JUDGE SITS AS A PER DIEM DISTRICT JUDGE

The Code of Judicial Conduct does not expressly prohibit lawyers in a per diem judge's law firm from practicing before other judges in the court in which the per diem judge sits. In fact, the code does not govern the conduct of the members of the per diem judge's law firm. However, if the appearance by a member of the per diem judge's firm before other judges on the same court would create an appearance of impropriety or undermine the 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.

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Examples of advisories issued in other states include the Arizona Judicial Ethics

Advisory Committee, which reasoned:

While the Code of Judicial Conduct does not apply directly to lawyers, the part-time judge cannot continue to associate with lawyers whose practice in her court gives rise to the appearance of impropriety. . . . The judge's continued association alone implicates Canon 2 by contributing to the apparent impropriety.

The associates and partners of a part-time judge generally may not appear in the judge's court, even if the judge does not hear their cases. 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 or advantage. Arizona Advisory Opinion 92-16.

Also, the Texas Committee on Judicial Ethics advised that the partners or associate attorneys of a part-time associate judge may not practice in the court in which the associate judge is appointed to serve. Texas Advisory Opinion 190 (1996). In that advisory, the Committee stated, "Canon 2B provides that a judge shall not permit others to convey the impression that they are in a special position to influence the judge. In this situation, partners or associates of the part-time associate judge would be in a position to convey this impression."

Similarly, other states have concluded that lawyers in the part-time judge's law firm should not practice in the court in which the part-time judge sits. See Florida Advisory Opinion 90-26; Indiana Policy Statement on Part-time Judges (December 8, 1983).

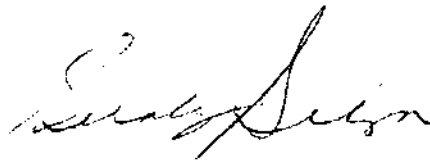
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Accordingly, this Commission concludes that per diem district judges, as well as the lawyers in their law firms cannot practice as lawyers in the district courts within the circuit in which the per diem judge sits.

FOR THE COMMISSION
ON JUDICIAL CONDUCT

A handwritten signature in cursive script, appearing to read "Gerald Y. Sekiya".

GERALD Y. SEKIYA, CHAIR

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

In the Matter of)
Amendments to the)
REVISIED CODE OF JUDICIAL CONDUCT)
_____)

ENGINEER L. SABADO
CLERK SUPREME COURT

DEC 30 4 21 PM '96

FILED

ORDER

The part of Hawaii's Revised Code of Judicial Conduct (exhibit B of the Rules of the Supreme Court of the State of Hawai'i) titled "Application of the Code of Judicial Conduct" is hereby amended by adding a new section D, as follows:

- D. Courts distinguished. For purposes of part B.(2) of this Application of the Code of Judicial Conduct, the District Family Courts and the District Courts are separate courts. A part-time judge assigned to preside solely in District Court is not disqualified from practicing before the District Family Court and a part time judge assigned to preside solely in the District Family Court is not disqualified from practicing before the District Court.

DATED: Honolulu, Hawai'i, December 30, 1996.

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