

**ETHICS OPINION NUMBER 149
OF THE MISSISSIPPI BAR
RENDERED JUNE 2, 1988**

CONFLICT OF INTEREST - A municipal judge pro tem and the members of his law firm may not represent defendants in cases which he has not participated in that court, but they may represent such defendants in circuit court on matters in which he did not participate in municipal court.

The Ethics Committee of the Mississippi State Bar has been asked to render an opinion concerning the following factual situation:

A Municipal Judge pro tem, who hears only those cases in which the Municipal Judge has a conflict of interest, want to know if:

1. He can represent criminal defendants in Municipal Court, in cases in which he has not participated.

2. Members of his law firm can represent criminal defendants in City Court so long as he has not participated in the case.

3. He can represent criminal defendants in Circuit Court on matters originating in Municipal Court but in which he did participate.

The first two questions provide a basis for disagreement. But this Ethics Committee concludes that respect for the integrity and independence of the judiciary of this state requires that they be answered in the negative.

The position of a municipal court judge pro tempore is established by Mississippi Code Section 21-23-9 (Supp.1987). That judge "shall have the same powers and shall perform all duties of the municipal judge in the absence of such municipal judge" Id. The request for an opinion limits the judge pro tem's judicial participation to a limited number of cases, namely, those in which the Municipal Judge has a conflict. The opinion of the Ethics Committee is limited to those facts and does not address the position of a judge pro tem who sits on a much more frequent basis, such as in the absence or unavailability of the judge for any reason.

Canon 2 of the Code of Judicial Conduct retains the mandate that "a judge should avoid impropriety and the appearance of impropriety in all his activities," and any suggestion of favoritism or other conflict of interest should be strictly avoided. A much earlier Judicial Canon was more specific: "[A judge] should not practice in the court in which he is a judge, even when presided over by another judge...." Former Judicial Canon 31, as quoted in ABA Formal Opinion 161.

However, the state has provided for the office of municipal judge pro tem to perform the functions of the municipal judge on those occasions when the municipal judge cannot. And it is not unreasonable to expect such a judge pro tem to be from the same community and to be experienced in the types of cases heard by the municipal court. Thus, there may be some question whether the Legislature intended to disqualify from the position of municipal judge pro tempore a lawyer who regularly practices, or whose firm practices, in the municipal court.

Likewise, in Formal Opinion 161 (May 5, 1936), the American Bar Association Committee on Ethics and Professional Responsibility considered a similar situation but reached a different conclusion from this Committee. That ABA Committee was reviewing the practice in light of Judicial Canon 31 (quoted above), which was in effect at the time. That Committee stated:

It may be doubted whether the committee which drafted this Canon had in mind the situation of a special or pro tem judge. In any event we think it cannot be said that one, who in keeping with the established judicial system of his state, serves as special or pro tem judge in aid of the regular judge, when the latter is disqualified, incapacitated, or for other reason unable to act, receives therefor, no compensation or only a small compensation based on the time of service and, as his primary means of livelihood, engages in the practice of law in the courts of his state, including the court over which he at times presides, thereby violates the Canon. He should, of course, refrain from acting in one capacity in any manner concerning which he has acted directly or indirectly in the other, and scrupulously avoid conduct whereby he utilizes or seems to utilize his judicial service to further his professional success. However, we think the Canon recognizes that one who assumes to act as judge on one day and as advocate the next in the same judicial system is confronted with inherent difficulties that ought to be avoided and deprecates the employment of such a system.

But the potential for special treatment of the judge pro tem or his partners in that court -- and, as significantly, the public's perception of such potential -- must be avoided. Suspicion might be cast, regardless of the propriety and public spiritedness of the judge pro tem. Therefore, even a part-time judge must not practice in the same court in which he sometimes presides.

As a general rule, a lawyer's partners and associates share his qualification or disqualification from participation or representation. M.R.P.C. 1.10. Thus, the other members of the judge pro tem's law firm may not practice in the Municipal Court, regardless of which judge is presiding.

The third inquiry has been answered by Opinion No. 133 of the Mississippi State Bar (June 4, 1987). While a lawyer who has acted as a municipal judge should not represent in Circuit Court any defendant over whose case he presided, or with whose case he or she had any direct or indirect contact while serving as municipal judge pro tempore, when that municipal judge was not involved with the defendant in the lower court proceedings, "there would be no conflict for the Municipal Judge to represent a criminal defendant in Circuit Court." Opinion No. 133. Likewise, there would be no disqualification of the members of the judge pro tem's law firm.