

**DELAWARE STATE BAR ASSOCIATION  
COMXITTEE ON PROFESSIONAL ETHICS  
OPINION 1989-6**

A member of the Delaware Bar has requested advice concerning the possible employment of a Register of Wills (hereinafter referred to as the "Prospective Employee") as a law clerk and eventually as an attorney with the firm.<sup>1</sup> Specifically, the attorney queries:

(1) What restrictions would be placed on the firm if the Prospective Employee was hired as a law clerk; (2) What restrictions would be placed on the firm if the Prospective Employee was hired as an attorney; (3) Is there a means by which any disqualification of the Prospective Employee would not be imputed to the firm; and (4) What is the geographical scope of any disqualification.

**CONCLUSION**

The Committee concludes that the Register of Wills is a judicial officer; The Delaware Judges' Code Of Judicial Conduct unequivocally prohibits the practice of law by a judicial officer; and therefore the Prospective Employee may not be hired as an employee.

**DISCUSSION**

The Constitution of the State of Delaware provides that the Register of Wills is a member of the judicial branch. See Del. Const. of 1897, art. IV §§ 1, 21, 22. That provision has remained constant since 1792 when the Constitution of 1792 first created the Register's Court and the office of Register of Wills. Wilmington Trust Co. v. Baldwin, Del. Super., 195 A. 287, 290 (1937). Subsequent Constitutions have carried forward the sections regarding the Register's Court and the Register of Wills essentially unchanged. Id. ("language has been continued in every

revision since 197211); In re Estate of Morrow, Del. Super. Ct & Orphans' Ct., 219 A.2d 137, 139 (1966); compare Del. Const. of 1792, art. VI, 1, 17 with Del. Const. of 1831, art. VI, 1, 21, 22 with Del. Const. of 1897, art. IV, §§ 1, 31, 32.

As early as 1842, the Court of Errors and Appeals, "the highest Court of the State, and concurred in by the Chancellor and every law judge of the state," Wilmington Trust Co., 195 A. at 290, held that the Register of Wills is a judge.

The constitution makes a manifest distinction between the duties of the register as an accounting officer, and his functions as a judge sitting in the register's court. Section 21 of article 6, [of the Constitution of 1831, now section 32 of Article IV of the Constitution of 1897] regards him as an auditor . . . . Section 22 [now section 31] considers him for certain purposes as a judge, and authorizes him to hold a court. It makes provision for the "litigation of causes," and requires depositions to be taken down as a part of the "proceedings in the cause." It contemplates parties litigant and adversary proceedings, neither of which is contemplated or practically observed as to the matters referred to in section 21.

Robinson v. Robinson's Adm'r, Court of Errors and Appeals, 3 Harr. 433, 437 (1842) (emphasis in original).

Since that time several jurists and commentators have reached the same conclusion. In 1906, Woolley, in his authoritative treatise on Delaware practice, explained that "[a] portion of the judicial power of the State is vested in Register's Courts," and that the court "is presided over by a Register of Wills." V. Woolley, Practice in Civil Actions and Proceedings in the Law Courts of the State of Delaware § 84 at 50 (1985) (footnote omitted);

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<sup>1</sup> The inquiring attorney has informed the Committee that his firm maintains a general practice in all the courts of all three counties of the State, including probate work in the Court of Chancery.

see also id. 42 at 25 (“[t]he Register [of Wills] is a judge, and the sentence of his court is the judgment of a tribunal of exclusive and peculiar jurisdiction on the subject matter before him”); In re Harmon's Will, Del. Super., 95 A.2d 47, 49 (1953)(citing § 25 of Woolley with approval).

In 1937, Judge Rodney surveyed the constitutional and statutory history of the office and concluded, relying on Robinson, that the Register of Wills served a dual role – as a judge and as an accounting officer. Wilmington Trust Co., 195 A. at 290. Similarly, Chancellor Wolcott, recognizing the judicial role of the Register of Wills explained, “[i]t is to be found from the constitutional and statutory provisions that the Register of Wills acts as both a judicial and an accounting official. He has judicial powers in connection with probate and petitions for review, and in the granting of letters of administration.” Delaware Trust-Co. v. McCune, Del. Ch., 80 A.2d 507, 509 (1951); Theisen v. Hoey, Del. Ch., 51 A.2d 61, 64 (1947) (“For some purposes, the Register of Wills clearly had judicial functions. . .”).

Likewise, then-Judge McNeilly examined the history of the Register of Wills and concluded that the Register of Wills occupied a "dual position," having both judicial and accounting powers. In re Estate of Morrow, 219 A.2d at 140, 144-145; see also In re Estate of Whiteside, Del. Supr., 258 A. 2d 279, 281 (1969)(Article 4 sections 31 and 32 of the Constitution of 1897 "have long been interpreted as meaning that the Register constitutes a Court for certain purposes, and an accounting officer for other purposes"); In re Estate of Webb, Del. Ch., 269 A.2d 413, 415 (1970), aff'd, Del. Supr., 276 A.2d 457 (1971) ("it is established Delaware law that the Register of Wills constitutes a court for certain purposes and an accounting officer for others").

The Committee recognizes that the Register of Wills no longer has complete original jurisdiction over probate matters. Pursuant to Article IV § 32 of the Constitution, amendments to Title 12 of the Delaware Code in 1974 and 1985 removed much of the judicial power of the Register of Wills and placed it within the original jurisdiction of the Court of Chancery. See 59 Del. Laws, ch. 384, § 1; 64 Del. Laws, ch. 252, § 8; Criscoe v. Derooy, Del. Ch., 384 A.2d 627, 631 n.2 (1978). Indeed, section 2501 provides that the Register of Wills "shall act only as a Clerk of the Court of Chancery." 12 Del. C. § 2501 (emphasis added). Nonetheless, the Registers of Wills retain some of their judicial powers. For example, the Registers of Wills have the power to issue commissions to take depositions outside of the state of Delaware. 12 Del. C. § 2503. More importantly, a Register of Wills "may hear and determine" certain probate matters, and "make all orders, adjudgments and decrees" which the Court of Chancery could make and if those orders are not set aside or modified by the Court of Chancery within 30 days they "shall have the same effect as if made by the Court." 12 Del. C. § 2502(b).<sup>2</sup>

The Delaware Judges' Code of Judicial Conduct ("the Code of Judicial Conduct"), Canon 5F, unequivocally provides that "[a] judge should not practice law." Rule 8.4 of the Rules

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<sup>2</sup> By contrast, a Family Court master is not a judge because a master only "hears" cases, whereas "a judge . . . not only 'hears' a case but also 'determines' the rights of litigants by entering a judgment of the Court." A.L.W. v. J.H.W., Del. Supr., 416 A.2d 708, 711 (1980). The Register of Wills, like a judge, is granted the power to "hear and determine" certain probate matters and "make all orders." 12 Del. C. § 2502(b). But cf. State v. Wilson, Del. Supr., 545 A.2d 1178, 1184 (1988) (stating in the context of Family Court Masters that "[t]he exercise of judicial authority under the Delaware Constitution, whether in courts created by the constitution or by statute, is limited to those persons who have been appointed by the Governor and confirmed by the Senate"). We believe that in so stating the Supreme Court in Wilson did not mean to imply that Registers In Wills were not judicial officers, and, of course, any such holding, which would overrule 150 years of precedent, would only be done directly.

of Professional Conduct deems it "professional misconduct for a lawyer to . . . (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law." Since the Prospective Employee's practice of law would violate Canon 5F it would therefore violate Rule 8.4(f) as well.<sup>3</sup> To the extent that the Register of Wills is only a quasi-judicial officer, the Code of Judicial Conduct still applies. "Anyone, whether or not a lawyer, who is an officer of a judicial system performing judicial functions, is a judge for the purpose of this Code. The Code of Judicial Conduct further provides that "All judges, including justices of the peace, should comply with this Code except that Masters in Chancery and Family Court masters shall comply with the Code as specified by special order of the Supreme Court." Delaware Judges' Code of Judicial Conduct, Canon 7.

Unlike the Code of Judicial Conduct, the ABA's Code of Professional Responsibility and Code of Judicial Conduct, Compliance with the Code of Judicial Conduct, § A(2), provides an exception to Canon 5F's prohibition upon the practice of law by judges. This section states that a part-time judge:

[S]hould not practice law in the court on which he serves or in any court subject to the appellate jurisdiction of the court on which he serves, or act as a lawyer in a proceeding in which he has served as judge or in any other proceeding related thereto.

ABA Formal Opinion 322 at 2 (May 18, 1969), Judicial Canon 31,

Private Law Practice.

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<sup>3</sup> That the Register of Wills is a law student and not a lawyer is irrelevant to this conclusion. "A law student who serves as a law clerk for a Delaware law firm is in a circumstance analogous to that of an associate" and, therefore, has "the duty of conducting himself [herself] in a fashion compatible with the Rules of Professional Conduct." Del. State Bar Ass'n Comm. on Prof. Ethics, Opinion 1986-1 at 2-3, 8.

The ABA Committee on Ethics and Professional Responsibility faced a similar problem in Informal Opinion 1294 (June 17, 1974) -- "Practice of Law by Probate Judge." There, a probate judge (similar to the Register of Wills) did not have to be a lawyer and was paid a low salary. This particular probate judge was a lawyer and continued to practice probate, contract and real estate law. The ABA Committee found such conduct unethical:

In the opinion of the Committee, it is virtually impossible for a probate judge to continue to practice law within the jurisdiction served by him as a judge or in opposition to counsel who appear before him from time to time without violation of the spirit and intent of the Code of Judicial Conduct.

ABA Informal Opinion No. 1294 (June 17, 1974).

A majority of jurisdictions which have addressed the propriety of a part-time judge's practice of law outside his judicial capacity have only prohibited the part-time judge from practicing in the court in which he serves. See, e.g., Ohio State Bar Ass'n Report, Board of Commissioners on Grievances & Discipline, Opinion 87-014 (June 22, 1987); Comm. on Prof. and Judicial Ethics of the State Bar of Michigan, Opinion CI-779 (July 19, 1982); Disciplinary Board of the Hawaii Supreme Court, Hawaii Bar News, Opinion 25 (December 20, 1979), modified on other grounds, Opinion 27 (January 11, 1983); North Carolina State Bar, Opinion 301 (April 15, 1960); Ill. State Bar Ass'n Comm. on Prof. Responsibility, Opinion 177 (December 2, 1958); Idaho State Bar Foundation, Opinion 38 (November 1, 1962).<sup>4</sup>

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<sup>4</sup> A minority of states have adopted a more lenient standard which allows part-time judges to practice in the courts in which they serve for matters not connected or related to their service as judges. See, e.g., Washington State Bar Association, 29 Wash. S.B. News 24, Opinion 160, (April 1975).

While the Committee recognizes the principles upon which these decisions rest, the Committee is mindful of its role to interpret the Rules as they exist; the legislation of exceptions to the Rules is not a matter for the Committee.<sup>5</sup> The Judicial Code was promulgated by order of the Delaware Supreme Court dated January 16, 1974. Accordingly, the absence of such an expressed exception for part-time judges or judicial officers, dictates our conclusion.

The inquiring attorney brings to the Committee's attention this Committee's decisions in opinion 1980-4 and Opinion 1982-5, which permitted, with certain limitations, a Lieutenant Governor and a State Legislator to maintain private law practices while still in office. These Opinions are clearly distinguishable. Neither a Lieutenant Governor nor a State Legislator is a member of the judicial branch, as is the Register of Wills. Moreover, the areas of responsibility for a lieutenant Governor and a State Legislator do not include the exercise of judicial powers.

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<sup>5</sup> The Delaware State Bar Association Bylaws § 6.16 charge that the Committee On Professional Ethics shall:

- (a) Propose to the Executive Committee for its review and adoption standards of ethics and conduct in the practice of the law and methods for effective enforcement thereof.
- (b) Upon request, advise members of the Association in respect to professional conduct of lawyers and ethics of the profession.
- (c) Be authorized when consulted by any member of the Bar or by any officer or committee of the Association to express its opinion concerning proper professional or judicial conduct, but these opinions shall not deal with questions of judicial decisions or judicial discretion and shall not be given until considered by the Committee and approved by the majority of all members thereof.
- (d) Report to the Executive Committee from time to time on the work of the Committee.

There is no geographical limit on the disqualification of the Prospective Employee from the practice of law. The Register of Wills is a judge and the jurisdiction of the Court of Chancery is statewide. 13 Del. C. § 2501; Del. Const. art. IV, § 16 ("jurisdiction of each of the aforesaid courts shall be coextensive with the State").

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