



NEW YORK STATE BAR ASSOCIATION

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Committee on Professional Ethics

Opinion 593 - 6/23/88 (13-88)

Topic: Confidential law clerks to town and village justices.

Digest: Proper for town or village justice to use confidential law clerk appointed by county in certain circumstances.

Code: DR 5-107, 5-107(A)(1), 5-107(B).

Code of Judicial

Conduct: Canon 3(A)(4), 3(A), 3(A)(6).

QUESTION

(1) May village or town justices use confidential law clerks appointed by the county board of supervisors to assist them in carrying out their adjudicatory responsibilities?

(2) Would there be an unethical conflict of interest when the district attorney appears before the local justice if the justice's confidential law assistant is an employee of the county that employs the district attorney?

OPINION

Most town and village justices who preside over courts having civil and criminal jurisdiction do not have law degrees. They are, therefore, often faced with the need to seek assistance in unfamiliar areas of the law.

In several instances, justices have been disciplined for engaging in *ex parte* discussions, particularly with prosecutors. *E.g., Matter of Sardino*, 58 N.Y.2d 286 (1983). Accordingly, justices must look elsewhere for their legal advice.

Section 109 of the Uniform Justice Court Act, which governs practice and procedure for town and village courts, provides that each court shall have

such non-judicial personnel as may be provided by the municipal board. While municipalities thus apparently have the authority to designate confidential law clerks to justices, we are told that many have not done so.* We have therefore been asked whether a justice may accept advice from a confidential law assistant appointed by a county.

We wish to emphasize that our Committee may only give advisory opinions to judges on the appropriateness of their own conduct under the Code of Judicial Conduct ("CJC"). Interpretations of law, such as the Judiciary Law, and the rules of court, including the Judicial Conduct Rules of the Chief Administrator of the Courts, 22 NYCRR Part 100, are beyond the province of this Committee. For example, whether the county, rather than a municipal board, has the authority to create the position of confidential law clerk to a judge, or to pay the salary of a court-appointed law clerk, are questions of law upon which we render no opinion.

The question to which we address ourselves is whether, assuming the county appoints or pays for a law clerk, the town or village justice may ethically use the services of such clerk.

The Code of Judicial Conduct

Canon 3(A)(4) of the Code of Judicial Conduct provides:

A judge should . . . except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

The Commentary to this section states:

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted. It does not preclude a judge from consulting with other

* The 1988 Annual Report of the Commission on Judicial Conduct recommended that the Office of Court Administration consider assigning a small unit of staff attorneys whose function would be to assist the court system's 2400 part-time town and village justices as legal research problems arise. See, Annual Report of the Commission on Judicial Conduct at 98

judges, or with court personnel whose function is to aid the judge in carrying out his adjudicative responsibilities. (emphasis added)

Thus Canon 3(A) specifies two situations in which a town or village justice could consult with confidential law clerks appointed by the county: (1) If the clerks are "court personnel;" and (2) if they may be deemed to be "disinterested experts" on the law and the justice gives notice to the parties that he has sought advice from the law clerk and the substance of the advice, and gives the parties reasonable opportunity to respond.

When Are Confidential Law Clerks Court Personnel?

In our opinion, the duties of confidential law assistants and the scope of their employment are more important in determining whether they constitute "court personnel" than the source of their compensation. The commentary to CJC Canon 3(A)(4) indicates the primary function of court personnel: "to aid the judge in carrying out his adjudicative responsibilities." Canon 3(A)(6) implies another attribute of court personnel: some are subject to the judge's direction and control and some are not. We believe that, in order for confidential law assistants who are not paid by the court to constitute "court personnel," they must be under the direction and control of the judges whom they assist.

In certain circumstances, a law clerk may be under dual direction and control. We believe that, as long as the duties of such clerks are limited to assisting judges and their work for the judges is subject to the control of the judges, the clerks would constitute "court personnel" within the meaning of the CJC.

Similarly, whether confidential law clerks designated or paid by a county constitute "court personnel" would depend upon the attributes of the job. If the law clerks worked full time for the justices and were subject to the sole direction and control of the justices, we believe they would constitute "court personnel" within the meaning of the CJC. If the law clerks worked part-time for the justice and practiced law part-time, but were subject to the direction and control of the justice with respect to all court work, then we still believe the law clerks would constitute "court personnel." Of course, like other part-time law officials, the law clerks would be subject to the conflict of interest rules of the Code of Professional Responsibility. *See generally*, N.Y. State 361 (1974) (confidential law clerk to a supreme court justice may not practice law in supreme court); N.Y. State 392 (1975) ("Lawyers whose public employment is part-time . . . should take particular care not to engage in activi-

ties or accept any private employment which would tend to undermine public confidence in the integrity and efficiency of the legal system'').

Although there is always a danger when a court officer is paid by one other than the court system, we do not believe that there should be a *per se* ethical prohibition against court personnel paid by a county or other body. We believe the situation is similar to that of lawyers who are paid by persons other than their clients. See DR 5-107. The Code permits a lawyer to be paid by one other than the client, as long as the client consents, DR 5107(A)(1), and the lawyer does not permit the person who pays him to direct or regulate his professional judgment in rendering legal services, DR 5-107(B). By analogy, we believe that, as long as the justices are aware of and do not object to the payment arrangements and the law clerks do not allow the persons paying their salaries to direct or regulate their professional judgment on behalf of the justices, the arrangement is permissible under the CJC.

Conflict of Interest

Assuming, *arguendo*, that county-appointed law clerks are court personnel, is there a conflict of interest or an appearance of impropriety if they assist a justice in a case in which the district attorney or another county official is a party?

If the district attorney or other county official who appears before the court had any input in the choice or compensation of the law clerk, or if the law clerk reported to the district attorney or such other official, the law clerk would surely have a personal interest which would disqualify him from serving the justice in all cases where the district attorney or other official was a party. We do not assume a personal interest or divided loyalty, however, merely by virtue of the fact that both the district attorney and the law clerk are employees of the same county. Thus, in N.Y. State 376 (1975), we held that a law clerk for a supreme court justice might simultaneously hold a part-time state government position as long as matters upon which he worked were not likely to be presented to the court for determination.

The Law Clerk as a Disinterested Expert

If the law clerk is not deemed to be "court personnel," then the justice can consult with the clerk only in accordance with CJC Canon 3(A)(4)'s procedure for consultation with disinterested experts, that is, (1) the clerk must be disinterested, and (2) the justice must give notice to the parties that he

has consulted with the clerk and the substance of the clerk's advice, and must afford the parties reasonable opportunity to respond. Whether the clerk is disinterested depends upon the factors discussed above under "Conflict of Interest."

CONCLUSION

GJC Canon 3(A) specifies two situations in which a town or village justice may consult with confidential law clerks appointed by the county: (1) If the clerks are "court personnel;" and (2) If they may be deemed to be "disinterested experts" on the law and the justice gives notice to the parties that he has sought advice from the law clerk and the substance of the advice, and gives the parties reasonable opportunity to respond. Law clerks appointed and paid by the county are "court personnel" if they are subject to the sole control of the judges in connection with their work for the court.
