



New York State Bar Association
Committee on Professional Ethics

Opinion 966 (5/21/13)

Topic: Private practice of law by town court clerk

Digest: A town clerk wishing to represent a private client in a matter pending in another town court may be limited by law and court rules, but is not automatically prohibited from such representation by the rules of legal ethics even if the client also has a matter pending before the clerk's court. If the clerk has substantive responsibilities for the pending matter and is thus in a position to influence the tribunal, then the representation may be prohibited by Rule 1.11(f)(2) unless the clerk informs the judge of the relationship so that the judge may take appropriate action. If the clerk does not participate in the pending matter or has solely ministerial duties, then the clerk would be able to represent the client, if not barred by any personal-interest conflict, but may not use the clerk's public office to try to influence either of the town courts in favor of the client.

Rules: 1.7(a), 1.11(d), 1.11(f)

FACTS

1. The inquiring lawyer, a court clerk in a town court ("Town Court A"), would like to represent a client who has a matter pending in another town court ("Town Court B"), when the same individual has a matter pending in Town Court A. The court clerk does not represent the client in the matter pending in Town Court A.

QUESTION

2. May a lawyer who is a court clerk in Town Court A represent a client who has a matter pending in Town Court B, when the same individual has a matter pending in Town Court A?

OPINION

3. There may be legal provisions governing government officers, and court rules, that govern conflicts of interest of court clerks arising from outside activities.¹ The Committee

¹ See Rule 1.11, Cmt. [1] (lawyer currently serving as a public officer or employee "may be subject to statutes and government regulations regarding conflicts of interest"). For example, the Chief Judge has adopted "Rules Governing Conduct of Nonjudicial Court Employees," 22 N.Y.C.R.R. §§ 50.1 - 50.6. See, e.g., *id.* §50.1 ("Code of ethics for nonjudicial employees of the

provides guidance only on the application of the Rules of Professional Conduct (the “Rules”). The application of legal provisions and rules of court is beyond the Committee’s jurisdiction, and we do not address those regulatory schemes. Rather, we assume for purposes of this opinion that all relevant court rules allow the lawyer/clerk to represent private clients as contemplated, and that the representation is not prohibited by law, such as local government ethics codes. We also assume that the client’s matters in Town Court A and Town Court B are not related.

4. As an ethical matter, a lawyer in the position of the inquirer must, when engaging in private practice, avoid any impermissible conflicts with the lawyer’s duties as a court clerk. We consider the Rules that delineate such conflicts.

5. We believe the Rule most likely to be implicated is Rule 1.11(f)(2), which provides: “A lawyer who holds public office shall not ... use the public position to influence, or attempt to influence, a tribunal to act in favor of ... a client.” While the term “public office” is not defined, we believe, based on the Rule’s text and underlying principles, that it would apply to court clerks. *Cf.* Rule 1.11, Cmt. [4] (applying to situation in which lawyer represents a government agency and another client successively):

“A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer’s professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client’s adversary obtainable only through the lawyer’s government service.”

Although the comment relates to a government employee who at times represents the government as well as a private client, the same concerns would apply where the lawyer does not represent the government, but is a court clerk who might be in a position to assist a private client. *See* Roy Simon, *Simon’s New York Rules of Professional Conduct Annotated* 610 (2013 ed.) (stating that Rule 1.11(f) covers lawyers who are not serving as lawyers during their government service).

6. The applicability of Rule 1.11(f)(2) does not mean that in all cases, the inquirer would be precluded from representing the private client in Town Court B. If the inquirer’s duties as a court clerk would not include any duties in connection with the client’s matter before Town Court A (and if the inquirer did not seek in any way other than the performance of assigned duties to influence Town Court A), then the Rule would not prohibit representation of the private client in the matter before Town Court B.

7. Moreover, that representation may be permissible even if the inquirer had very limited duties in connection with the client’s matter before Town Court A. If the inquiring clerk’s duties are solely ministerial, such as assigning docket numbers to cases, then we believe the clerk would generally not be in a position to influence the tribunal in Town Court A to act in favor of the client represented by the clerk in Town Court B.

Unified Court System”); § 50.6(a) (practice of law by full-time employees); §50.6(d) (practice of law by part-time employees). However, we do not address the applicability or import of those provisions in the circumstances of this inquiry.

8. However, if the clerk's responsibilities include providing research or advice, or otherwise assisting the judge handling the matter, then the clerk may well be in a position to influence the tribunal, implicating Rule 1.11(f)(2).² In such a circumstance, we believe the representation of the client before Town Court B would be prohibited unless the clerk were to inform the judge in Town Court A before whom the client's matter is pending of the clerk's proposed relationship with the client, so that the judge may take appropriate action, including ensuring that the clerk does not participate in the case and is not in a position to exert any influence.

9. We note two further restrictions that would apply even when the inquirer's representation of the client in Town Court B would be permissible under the analysis above. First, Rule 1.11(f)(2) would prohibit the clerk not only from using his or her public office to try to influence Town Court A, but also from using it to try to influence Town Court B.

10. Second, Rule 1.7(a)(2), which governs personal-interest conflicts, applies to lawyers in government.³ Although the facts as submitted do not suggest such a conflict, the inquirer should be mindful of this rule. The inquirer could not represent the client in Town Court B, except with that client's informed consent, when a reasonable lawyer would conclude that there is a significant risk that the lawyer's professional judgment on behalf of the client would be adversely affected by the lawyer's own financial, business, property or other personal interests, including, in this case, the lawyer's government employment.

CONCLUSION

11. The lawyer's ability to represent private clients may be limited by law or court rules, such as the Chief Judge's Rules Governing Conduct of Nonjudicial Court Employees. We do not opine on the applicability or import of any such restrictions.

12. No ethical rule invariably prohibits a town court clerk who is a lawyer from accepting a private client in a matter pending in another town court, even if the client also has a matter pending before the clerk's court. The clerk may represent the client if the clerk does not participate in that matter pending before the clerk's court, or participates in ways that are solely ministerial. If the clerk has substantive responsibilities for such matters and is thus in a position to influence the tribunal, then the clerk may not represent the private client unless he

² Moreover, if the clerk's personal involvement were "substantial," another provision could be implicated. Under Rule 1.11(d)(2), a lawyer currently serving as public officer or employee may not negotiate for private employment with any person who is involved as a party in a matter in which the lawyer is participating personally and substantially, except as may otherwise be expressly provided by law. If negotiating to be retained constitutes negotiating "for private employment" under this Rule – a question we need not reach in light of our analysis above – then this Rule would be relevant as well.

³ See Rule 1.11, Cmt. [1] ("A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7.").

or she informs the judge of the relationship with the client, so that the judge may take appropriate action, including ensuring that the clerk does not participate in the case and is not in a position to exert any influence. In any event, the clerk may not represent the client if barred by a personal-interest conflict, and may not use his or her public office to try to influence either town court to act in favor of the client.

(40-12)