



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1056 (6/2/15)

Topic: County clerk; law practice; conflict of interest

Digest: Subject to any overriding law or regulation governing the office, a county clerk may engage in the private practice of law provided the clerk does not participate in any way in any matter before the clerk's office in which the clerk is personally and substantially involved in private practice, and avoids use of the public office to obtain special treatment for a private client, to influence a tribunal in favor of a client, or to receive consideration from anyone in the guise of legal fees to influence official conduct.

Rules: 1.11(d) & (f)

FACTS

1. The inquirer is an elected county clerk who intends to continue practicing law while serving in that position. His law practice consists exclusively of representing parties to transactions involving real property. He confines his practice to counties adjacent to the county where he serves as clerk; he does not represent parties in transactions in the county where he serves as clerk.

2. Section 525 of the New York County Law defines the duties of a county clerk as follows:

1. The county clerk shall perform the duties prescribed by law as register, and be the clerk of the supreme court and clerk of the county court within his county. He shall perform such additional and related duties as may be prescribed by law and directed by the board of supervisors. 2. He shall provide at the expense of the county, all books, files and other necessary equipment for the filing, recording and depositing of documents, maps, papers in actions, and special proceedings of both civil and criminal nature, judgment and lien dockets and books for the indexing of same as directed or authorized by law.

3. Section 806 of the New York General Municipal Law provides that a county may adopt a code of ethics:

setting forth for the guidance of its officers and employees the standards of conduct reasonably expected of them. Such code shall provide standards for officers and employees with respect to disclosure of interest in legislation before the local governing body, holding of investments in conflict with official duties, private employment in conflict with official duties, future employment and such other standards relating to the conduct of officers and employees as may be deemed advisable. Such codes may regulate

or prescribe conduct which is not expressly prohibited by this article but may not authorize conduct otherwise prohibited. Such codes may provide for the prohibition of conduct or disclosure of information and the classification of employees or officers.

4. Section 808 of the New York State General Municipal Law also permits a county to establish boards of ethics to promulgate standards and to issue advisory opinions to elected officials on the consistency of proposed actions with the county's ethical norms.

QUESTION

5. Do the New York Rules of Professional Conduct (the "Rules") circumscribe the inquirer's legal practice while serving as county clerk?

OPINION

6. Rule 1.11(d) states:

Except as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee shall not:

- (1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or
- (2) negotiate for private employment with any person who is involved as a party or as a lawyer in a matter in which the lawyer is participating personally and substantially.

7. The opening phrase of Rule 1.11(d) makes clear that any law or regulation governing the conduct of a current government official has priority over the Rules. The provisions of the General Municipal Law that authorize counties to regulate the conduct of officials are one example of the type of law or regulation that would override any inconsistent provisions of the Rules. Provisions regulating the extent of outside employment by a county official may also appear in the Public Officers Law, the County Law and the Municipal Home Rule Law. This list is not intended to be exhaustive of potentially applicable rules; others may bear on the clerk's ability to engage in law practice. *See, e.g.*, Rules Governing Conduct of Nonjudicial Court Employees, 22 N.Y.C.R.R. §§ 50.1-50.6. Our jurisdiction is limited to opinions on the Rules, and thus we do not address the applicability of these or any other provisions of law to this inquiry.

8. Another provision of Rule 1.11 applies specifically to current government employees. Rule 1.11(f) states:

A lawyer who holds public office shall not:

- (1) use the public position to obtain, or attempt to obtain, a special advantage in

legislative matters for the lawyer or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest;

- (2) use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client; or
- (3) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's actions as a public official.

9. In N.Y. State 966 (2013), we discussed Rule 1.11(f)(2) in a situation in which the town clerk of Town A wished to represent a client in the court of Town B at a time when the client also had a matter pending in the Town A court. There we said:

The applicability of Rule 1.11(f)(2) does not mean that in all cases, the inquirer would be precluded from representing the client's matter before Town Court B. *If the inquiring clerk's duties as 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 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.*

[emphasis supplied] Of significance, we then added:

Moreover, the 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 number 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.

10. This reasoning is equally applicable here. The inquirer is clerk of County A and engages in practice solely in transactional matters in Counties B, C, D, and E. The inquirer's work on behalf of clients in those latter counties would not include any matter in County A. Although not precisely posed by the inquiry, by analogy to N.Y. State 966, if the inquirer is counsel in a matter, say, in County C, to a client who also has a matter pending in County A, the inquirer must not seek in any way other than performance of ministerial duties to influence the client's matter in County A.

11. The prohibitions in Rule 1.11(f)(1) and 1.11(f)(3) are straightforward. For instance, a lawyer's use of a county clerk's position, on behalf of a client, to obtain special treatment for a private client before the county board of supervisors would run afoul of Rule 1.11(f)(1) unless the official could make a good faith judgment that the client's interests accord with the public interest. Likewise, under Rule 1.11(f)(3), the maintenance of a private business, whether in law or otherwise, as a vehicle to receive anything of value to influence an official judgment would be inconsistent with Rule 1.11(f)(3).

CONCLUSION

12. Subject to any overriding law or regulation governing the office, a county clerk may engage in the private practice of law provided the clerk does not participate in any way in any matter before the clerk's office in which the clerk is personally and substantially involved in private practice, and avoids use of the public office to obtain special treatment for a private client, to influence a tribunal in favor of a client, or to receive consideration from anyone in the guise of legal fees to influence official conduct.

(3-15)