



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

Opinion 1169 (07/08/2019)

Topic: Town Supervisor; Law Practice; Conflict of Interest

Digest: Subject to any law or regulation governing the office, a public official may engage in the private practice of law, provided that the public official does not represent any private client in a matter involving the official’s jurisdiction, does not participate in any matter in which the lawyer participated personally and substantially while in private practice; does not negotiate for private representation on matters with the jurisdiction in which the official would have a role; avoids the use of 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 in order to influence official conduct; and does not represent a private client with interests adverse to a person about whom the official acquired confidential government information in a matter in which the information could be used to that person’s material disadvantage.

Rules: 1.11(c), (d) and (f)

FACTS

1. The inquirer is an attorney in private practice in a Town, a municipal corporation, where the inquirer regularly represents business clients located within the boundaries of the municipality. The inquirer wishes to seek public office as Town Supervisor, the powers of which could potentially affect some private clients.

QUESTIONS

2. May a lawyer continue to represent private clients located within a Town while serving as Town Supervisor?

3. May a lawyer represent private clients before the Town Board, Planning Board, Zoning Board of Appeals, Town Court, or any town departments while serving as Town Supervisor?

4. Are there any other ethical restrictions on a lawyer’s private practice of law as a result of serving as Town Supervisor?

OPINION

5. Rule 1.11(d) of the N.Y. Rules of Professional Conduct (the “Rules”) says:

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 lawyer for a party in a matter in which the lawyer is participating personally and substantially.

6. As Rule 1.11(d) makes clear, any law or regulation governing the conduct of a current governmental official has priority over the Rules. “[E]ven if conduct is not prohibited by Rule 1.11(d), it may still be prohibited or regulated by statutes or ethics codes. Consequently, before a lawyer in public service analyzes Rule 1.11(d), the lawyer should research statutes, ethics codes, and other authorities that apply to government lawyers, since those authorities will trump Rule 1.11.” R. Simon & N. Hyland, *Simon's New York Rules of Professional Conduct Annotated* 793 (2017 ed.)

7. For example, the General Municipal Law authorizes municipal corporations to regulate the conduct of officials – for instance, in a Code of Ethics – that would override any inconsistent provisions of the Rules. Provisions regulating the extent of outside employment by a town official may also appear in the Public Officers Law, the Municipal Home Rule Law, and the Town Law. This list is not intended to be exhaustive of potentially applicable rules, as other rules may bear on the Town Supervisor's ability to engage in a private law practice. This Committee's jurisdiction is limited to interpreting the Rules, and thus we do not address here the applicability of other laws that the lawyer must consult by the terms of Rule 1.11(d).

8. Rule 1.11(d) has two prongs. First, it generally prohibits a government officer or employee from participating in a matter in which the lawyer participated personally and substantially while in private practice. This prohibition is subject to the “rule of necessity,” which permits the official or employee to participate in a matter of public service even if he or she participated personally and substantially in the matter outside of government service if the official or employee in question is the only one who can possibly be authorized to act on a particular matter. *See* N.Y. State 968 ¶ 29 (2013). Thus, a lawyer serving as Town Supervisor must recuse himself or herself from any participation in, or discussion of, matters in which he was involved as a private attorney, even where, as here, the lawyer is playing a non-legal role in government, unless the elements of necessity apply.

9. The second prong of Rule 1.11(d) prohibits a government officer or employee from negotiating for private employment with any person who is involved as a party or as a lawyer for a party in a matter in which the lawyer is participating personally and substantially. This Rule limits a lawyer serving as Town Supervisor from taking on the representation of private clients with regular business with the Township, as the lawyer serving as Town Supervisor would be prohibited from negotiating a retention with any party involved in matters in which the Town Supervisor would have a role.

10. Rule 1.11(f) also governs the conduct of lawyers in public office. The Rule states that 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 action as a public official.

11. N.Y. State 1056 (2015) discussed the circumstances under which a County Clerk may engage in the private practice of law. There, we commented that, as a public official seeking to engage in private practice, the County Clerk's conduct was governed by Rules 1.11(d) and (f). We noted:

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.

12. In N.Y. State 510 (1979), we considered whether a deputy Town Supervisor could represent private clients in tax certiorari or other proceedings involving the Town. We concluded that, because the deputy Town Supervisor would assume the duties of the Town Supervisor in the Town Supervisor's absence or inability to act, he could not participate in any litigation involving the Town on behalf of a private client. We commented:

As an official charged with preserving the funds of the town, the representation of a private client whose interest is to reduce his taxes, or to obtain a judgment against the town, or to prevent a judgment by the town against him, would place the deputy in a position where his duty to his client conflicts with his duty toward the town. Such a conflict should be avoided . . . Even if the conflict were less direct, the deputy should avoid the appearance of impropriety which would inevitably arise from his representation of a party who might receive some benefit to the disadvantage of the town.

13. This analysis applies with greater force to the Town Supervisor, who is primarily charged with preserving the funds of the Town. In such a position, the Town Supervisor cannot represent any private client whose interests may be adverse to those of the Town.

14. We further commented, quoting N.Y. State 431 (1976):

Rules disqualifying lawyers who are part-time officials from accepting private clients in certain situations are designed to serve two basic purposes. Primarily the disqualification rules serve to prevent private clients from retaining a part-time public official in the hope of gaining some improper advantage by reason of his lawyer's public office. In

addition, the rules are designed to prevent public suspicion that the client may be gaining some improper advantage by retaining the public official.

15. The prohibitions of Rules 1.11(f)(1) and (3) are clear. They prohibit a lawyer from using his or her position as Town Supervisor to obtain special treatment for a private client, unless the official could make a good faith judgment that the client's interests accord with the public interest. Likewise, the Town Supervisor's use of a private law practice as a vehicle to receive anything of value to influence an official judgment would run afoul of the Rules.

16. Rule 1.11(c) places further restrictions on the conduct of lawyers who are public officers or employees. It provides, in relevant part:

Except as law may otherwise expressly provide, a lawyer having information that the lawyer knows is confidential government information about a person, acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term 'confidential government information' means information that has been obtained under governmental authority and that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public.

17. Thus, to the extent that a lawyer serving as Town Supervisor has access to confidential government information about any person as a result of the lawyer's status as a public officer or employee, the lawyer may be disqualified from representing private clients with interests adverse to that person in any matter in which the information could be used to that person's material disadvantage. This provision applies even if the lawyer did not work on a matter and came across the confidential government information by happenstance. This Rule applies only when the lawyer has confidential government information and does not operate with respect to information that merely could be imputed to the lawyer.

CONCLUSION

18. In sum, while Rule 1.11 does not prohibit the inquirer from representing private clients located within the Township while he is serving as Town Supervisor, subject to any further restrictions under applicable law, the inquirer cannot represent any private client in a matter involving the Town and should not participate, in his role as a public official, in any matter in which he participated personally and substantially while in private practice. Additionally, the inquirer may not negotiate for private employment with any party involved in matters with the Township in which he would have a role. The inquirer should also avoid the use of his 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 in order to influence official conduct. Finally, if the inquirer acquires confidential government information about any person, the inquirer may not represent a private client with interests adverse to that person in a matter in which the information could be used to that person's material disadvantage.

[02-19]