



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

**Opinion 1187 (05/06/2020)**

**Topic:** Police officer representing traffic court defendants

**Digest:** A lawyer who is a Village police officer may not represent defendants in traffic court in the county where the Village police department is located. Whether the officer may do so in other counties depends on the facts and circumstances, and is subject to compliance with both the rules governing conflicts of interest for lawyers in private practice and the rules governing lawyers serving as public officers or employees.

**Rules:** 1.7(a), 1.7(b), 1.11(c), 1.11(d), and 1.11(f)

**FACTS**

1. The inquirer is a police officer with a Village Police Department in New York and is admitted to practice law in New York. The inquirer wants to represent defendants in traffic court, both in the county where the inquirer serves as a police officer and in other counties. According to the inquirer, traffic infractions are ordinarily classified as “violations,” not as misdemeanors or felonies, and thus are not “crimes” in New York as the inquirer understands that term. In our understanding, some traffic infractions may be deemed crimes (driving while intoxicated, for example), but accept for our purposes that others may not be.

**QUESTION**

2. May a lawyer who is a Village police officer represent defendants in a county traffic court, either in the county where the Village police department is located or in other counties?

**OPINION**

3. The N.Y. Rules of Professional Conduct (the “Rules”) impose certain duties on a lawyer currently serving as a public officer such as a police officer. In N.Y. State 615 (1991), we considered whether a police officer could represent a criminal defendant consistent with DR 9-101(B) of the Code of Professional Responsibility (the “Code”), the predecessor of the Rules. DR 9-101(B) said that a lawyer “shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee.” In Opinion 615, we concluded that “a former police officer could not as lawyer represent a criminal defendant in any matter in which the lawyer had personally participated as a police officer.” It went without saying that, if a former lawyer/police officer was barred from representing a criminal defendant in a matter in which the officer had participated personally and substantially,

then a current police officer would be barred from such conduct as well.

4. Rule 1.11(d), which is the successor to DR 9-101(B), says:

(d) 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.

5. Our jurisdiction is limited to questions arising under the Rules and does not extend to questions of law. Thus, we express no view on whether "law may otherwise expressly provide" contrary to the language of Rule 1.11.

6. Under Rule 1.11(d)(1), if the inquirer has represented defendants of any kind in the past or begins representing traffic court defendants going forward, the inquirer would be prohibited from working as a "public officer or employee" – including as a police officer – on any matter in which the inquirer "participated personally and substantially" while in nongovernmental employment.

7. Under Rule 1.11(d)(2), the inquirer may not negotiate to represent (or agree to represent) any traffic court defendant as a private client if that defendant "is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially." For example, if the inquirer is participating personally and substantially in investigating X with respect to drug dealing, then Rule 1.11(d)(2) would prohibit the inquirer from representing X in traffic court. This would be so even if the traffic court matter is wholly unrelated to the drug investigation. A public officer or employee who is a lawyer may not serve as a private lawyer for any person "involved" in a government matter in which the lawyer is participating personally and substantially, whether the person is involved as a witness, a suspect, an independent contractor, a government supervisor, or otherwise.

8. When acting as a private defense lawyer, the inquirer must also comply with Rule 1.11(c), which provides:

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. ...

Rule 1.11(c) defines the term "confidential government information" to mean "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." For example, if the inquirer knows of

unfavorable employment reviews or non-public job discipline imposed on a police officer who is a witness in a traffic court matter, and if that information “could be used to the material disadvantage” of that person in plea negotiations or impeachment, then the inquirer may not represent a traffic court defendant in that matter.

9. The inquirer must also abide by Rule 1.11(f), which says (in pertinent part) that a lawyer shall not “use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client; or 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.” By way of easy illustration, the inquirer may not suggest to a traffic court judge that the inquirer could use a public position as a police officer to give special treatment to the traffic court judge if the judge is caught speeding. Likewise, the inquirer may not accept an outsize fee or expensive gift from a traffic court client if it is obvious that the fee or gift is for the purpose of influencing the inquirer’s actions as a police officer.

10. We recently applied Rules 1.7 and 1.11 in N.Y. State 1170 (2019), in which a Village attorney asked about the ethical implications of appearing in Town Justice Court defending clients who were facing charges that did not involve the Village. There, we said:

A Village Attorney who does not represent the Village in court or in criminal matters is not ethically prohibited from representing private clients in defense of Vehicle and Traffic Law violations, criminal proceedings, or Town Ordinance violation cases brought in the Town Justice Court, funded exclusively by the Town, that adjudicates Village Ordinance violations, provided that no unconsented financial or business conflicts of interest exist under Rule 1.7(a)(2), and provided that the provisions on current government employees in Rule 1.11 are respected.

11. We reach an analogous conclusion here. On our view, whether a police officer may represent clients in traffic violation matters depends on the facts and circumstances of the representation, with two caveats. First, a police officer engaged in private legal practice may not represent traffic court defendants in the same county where the police officer works, because such conflicts arising under Rule 1.7(a)(2) would on our view not be subject to consent under Rule 1.7(b)(1). Second, whatever confidential information the inquirer learns in private practice with respect to a traffic court client or prospective client, the inquirer must not use or reveal that information to advance his work as a Village police officer except as permitted by Rules 1.6, 1.9(c), and 1.18(b).

12. In N.Y. State 615, we considered whether conflicts of interest would arise if a lawyer who was a police officer represented criminal defendants in private practice. We concluded that conflicts would arise. We said that “it is impermissible for the firm to practice criminal law in the town and village courts because it would be inappropriate for the police officer personally to represent criminal defendants.” We explained our reasoning as follows:

... [A] criminal defendant is entitled to a defense and representation of undivided loyalty within the limits of the law.

No matter how earnest and complete a defense the lawyer provides, there is an obvious danger that a convicted defendant will believe that his defense was inadequate because of the lawyer's bias as a police officer. Conversely, the public might lose faith in the criminal justice system if it believes that the lawyer was employed in the hope that the lawyer's

position as a police officer might enable the lawyer to obtain more lenient treatment for the defendant. A police officer is widely viewed as a representative of the people. We believe that the representation of a criminal defendant by a police officer could lessen public confidence in the integrity of the criminal justice system. Furthermore, the dual roles of police officer and defense attorney could find the lawyer challenging in the latter capacity the very laws the police officer is sworn to enforce in the former capacity. Thus *we* find that DR 5-101(A) renders impermissible the lawyer's representation of criminal defendants. ...

13. That the inquirer here may be defending infractions rather than crimes does not alter our conclusion. In N.Y. State 615, we relied on DR 5-101(A). The successor to DR 5-101(A) in our current Rules is Rule 1.7(a)(2), which provides, in pertinent part, as follows:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that ...

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law; ... and

(4) each affected client gives informed consent, confirmed in writing.

14. Applying Rule 1.7(a)(2) to the facts before us, we believe that a reasonable lawyer would perceive a "significant risk" that, in some cases, the inquirer's professional judgment on behalf of a traffic court client will be adversely affected by the inquirer's financial and personal interests. The inquirer's financial and personal interests include staying in the good graces of his superiors on the police force and in Village government, as well as not incurring the wrath of peers in police departments in the Village and in other towns and villages. For example, when representing a traffic court defendant, the inquirer might be inhibited from arguing that a given police technique is defective, or might be inhibited from arguing that a police officer witness is lying, or might be inhibited from arguing that a defendant was ticketed solely so that an officer could make a quota. In any situation presenting such conflicts of interest, the inquirer may not take on the representation of a traffic court defendant unless the conflict is subject to consent and the inquirer obtains the client's informed consent pursuant to Rule 1.7(b).

15. Applying Rule 1.7(b)(1), our analysis of consent depends on whether the traffic court matter is in the same county where the inquirer serves as a police officer or instead in some other county. When a traffic court defendant will appear in a traffic court in the same county where the inquirer serves as a police officer, we believe the conflict is not subject to consent. But in other counties, the outcome will turn on whether the inquirer reasonably believes the inquirer will be able to provide competent and diligent representation to the traffic court defendant as required by subparagraph (b)(1). This is a case-by-case determination, depending on all of the facts and circumstances.

16. For example, one relevant circumstance will be the relationship between the nature of the traffic violation and the inquirer's work as a police officer. By way of modest example, if the inquirer as a police officer is currently a witness against a driver who made an improper left turn

at a busy intersection, then the inquirer as a private lawyer may be unable to provide competent and diligent representation to a defendant charged with making an improper left turn at a busy intersection. Each representation of a traffic court defendant will require a separate analysis taking into account all of the facts and circumstances of both the particular representation and the inquirer's responsibilities and experience as a police officer. In the event that the inquirer concludes that a conflict may exist but is subject to consent, then under Rule 1.7(b)(4) the consent must be "informed consent, confirmed in writing."

## **CONCLUSION**

17. A lawyer who is a Village police officer may not represent defendants in traffic court in the county where the Village police department is located. Whether a police officer may represent traffic court defendants in private practice in other counties depends on the facts and circumstances of the representation, and is subject to compliance with both the rules governing lawyers serving as public officers or employees and the rules governing conflicts of interest for lawyers in private practice.

(18-19)