



Committee on Professional Ethics

Opinion 893 (12/1/11)

Topic: Assistant District Attorney accepting appointment as foreclosure referee.

Digest: A full-time prosecutor may accept appointment to referee foreclosure panels, and may oversee foreclosure proceedings, provided there is no conflict.

Rules: 1.7, 1.12

QUESTION

1. May a full-time Assistant District Attorney seek and accept appointment to a court-appointed referee foreclosure panel?

OPINION

2. New York law permits courts to appoint referees from court-appointed referee panels to exercise a number of powers in connection with a foreclosure. N.Y. Civ. Prac. L & R. § 4301. Referees compute the value of foreclosed property and sell it at public auction. N.Y. Civ. Prac. L. & R. §1351(1). The statutory fee is \$50 to compute the value of the property and \$500 to sell the property, although the court can authorize a higher fee for property with a sales price that exceeds \$50,000. N.Y. Civ. Prac. L & R. §8003(b).

3. Applicants to be referees complete a short form that includes the applicant's education and experience, prior court appointments, and the appointment requested. The Office of Court Administration does not conduct screening of those seeking appointment, and appointment of referees is left to the discretion of individual judges. Rules of the Unified Court System, pt. 36 Appointments; NYS Office of Court Administration, Report of the Commission on Fiduciary Appointments (Dec. 2001).

4. No per se rule in the New York Rules of Professional Conduct prohibits the Assistant District Attorney from accepting an appointment to a referee panel. We caution, however, that apart from the Rules of Professional Conduct, there could be other provisions – such as in county law or the ethics rules for a particular District

Attorney's office – that could prohibit an Assistant District Attorney from accepting an appointment as a referee. This committee does not opine on questions of law, regulation or agency policy.

5. Moreover, although no *per se* provision in the Rules of Professional Conduct prohibits the Assistant District Attorney from accepting an appointment as a referee, the rules governing conflicts of interest may prohibit an Assistant District Attorney, in particular situations, from accepting appointment to the panel generally or overseeing a particular foreclosure:

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.

Rule 1.7(a); *see also* Rule 1.7(b) (setting forth an exception based on informed consent and other factors).

6. An Assistant District Attorney should avoid situations in which his or her interests in being a referee would create a conflict under Rule 1.7(a)(2). For example, given the discretion of a judge to make a referee appointment, the attorney should consider whether it is appropriate to accept a referee assignment from a judge before whom the attorney frequently appears or is currently appearing in the role of prosecutor, or to seek appointment to a panel that would routinely result in assignments from such a judge.

7. While it usually will be ethical for an attorney to accept an appointment to a referee panel, the Assistant District Attorney must also consider whether there may be a conflict under Rule 1.7(a)(2) with respect to an appointment to oversee any particular foreclosure. An attorney should not serve as a referee in a matter where one of the parties to the foreclosure is currently being prosecuted or is likely to be prosecuted by the District Attorney's office in which the Assistant District Attorney serves. The Assistant District Attorney should also consider whether it would be appropriate to serve as a referee in a proceeding in which he or she has previously participated in a criminal matter in which any party to the foreclosure was involved. Whether serving as a referee in such a situation would constitute a conflict under Rule 1.7(a)(2) might depend on the length of time that had passed since the criminal proceeding, the extent of the Assistant District Attorney's involvement in that matter, and the extent of the party's involvement in that matter (*e.g.*, as a defendant, witness, juror, or complainant). Where the foreclosure involves law enforcement personnel with whom the Assistant District Attorney works as a prosecutor, the attorney should weigh whether these professional relationships might affect his or her professional judgment. *See* N.Y. State 544 (1982); N.Y. State 800 (1986).

8. We note also that should an Assistant District Attorney accept an appointment as a referee in a matter, he or she might thereafter be subject to various provisions of Rule 1.12, such as restrictions on subsequent employment, because a referee is an "adjudicative officer" and a "third-party neutral," which are two of the categories of

lawyers covered by that Rule. See Rule 1.12, Cmt. [1]. The question before us is whether an Assistant District Attorney may accept appointment as a referee, not what restrictions may apply to him or her after accepting such appointment. But we urge an Assistant District Attorney in this situation to study Rule 1.12 carefully if and when he or she accepts an appointment as a referee.

CONCLUSION

9. A full-time prosecutor may accept appointment to a referee foreclosure panel and may oversee foreclosure proceedings, provided there is no conflict under the Rules of Professional Conduct.

(18-11)