



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

Opinion 1170 (07/09/2019)

**Topic:** Conflict of Interest; village attorney

**Digest:** A Village Attorney who does not represent the Village in court or in criminal matters, may represent private clients in defense of traffic violations, criminal proceedings, or Town Ordinance violation cases brought in the same Town Court that adjudicates such matters arising from summonses issued and arrests that occurred within the Village boundaries, provided that the lawyer adheres to rules governing conflicts and current government employees.

**Rules:** 1.7(a)(1), 1.7(a)(2), 1.11(c), 1.11(d) and 1.11(f)

**FACTS**

1. The inquirer is the Village Attorney, appointed annually, for an incorporated Village that has no Village Justice Court or separate Village Police Department. The inquirer attends bi-monthly meetings of the Village Board, advising on a variety of legal matters, but maintains a separate private legal practice. The inquirer does not represent the Village in Town Justice Court, where Village Ordinance violation cases are adjudicated. The Town Justice Court also adjudicates Vehicle and Traffic Law (“VTL”) and criminal cases where summonses were issued or arrests were made by a police department that patrols the entire Town, including the geographic area of the Village located wholly within Town boundaries. VTL violation and other criminal cases are prosecuted by the District Attorney for the county.

2. The Town Justice Court is located in a building owned by the Town. The expenses of operating and maintaining the Town Justice Court, including the salary of the two elected Town Justices, are paid exclusively by the Town. The Village receives some revenue as a result of the disposition of certain criminal charges in which the Town and Village share monetary fines, as well as fines generated by the disposition of Village Ordinance violations that are adjudicated in the Town Justice Court. There is a formula that governs the allocation, between the Town and the Village, of the fines collected in the Town Justice Court arising from violations in the Village. With respect to any given offense, that formula may be fixed by statute, or it may be the product of an agreement between the Town and Village. The percentages allocated in the formula may also differ depending on the particular offense, or category of offense. In addition, the total amount of the fines that are annually distributed to the Village may be substantial or nominal in relation to the overall Village budget.

3. The vast majority of cases pending on the VTL and criminal dockets are resolved by plea negotiation. Not only the amount of the fines, but the particular government entities that receive a portion of the fines, will depend on the particular statutes or ordinances to which the defendant

has pled guilty.

4. In private practice, the inquirer appears in Town Justice Court defending only clients who are facing charges that do not involve the Village.

## **QUESTION**

5. May the inquirer continue to represent persons charged with crimes, VTL violations or other offenses prosecuted by the District Attorney or Town Attorney in the Town Justice Court?

## **OPINION**

6. The question posed implicates Rules 1.7 and 1.11 of the N.Y. Rules of Professional Conduct (the “Rules”).

### **Rule 1.7**

7. Rule 1.7(a)(1) prohibits simultaneous representation of two clients where a reasonable attorney would conclude that “the representation will involve the lawyer in representing differing interests.” “Differing interests” are defined by Rule 1.0(f) to include “every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be conflicting, inconsistent, diverse or other interest.” Rule 1.7(a)(2) prohibits a lawyer from representing a client if “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.”

8. Here, we are told that, in matters in which the offense occurred in the Village, a formula exists to allot any fine between the Village and the Town, and that most dispositions are products of plea bargaining. We assume for our purposes that the Village Attorney is familiar with the formula.

9. In representing clients in the Town Justice Court, a Village Attorney in private practice may have the opportunity to guide and cause a client to reach a negotiated disposition that is less favorable to the private client but more favorable to the Village, even though the Village is not a party to the matter, because that disposition will produce a greater dollar return for the Village when the fine is paid and apportioned. Conversely, the lawyer may have an opportunity to negotiate a disposition that is less favorable to the Village in order to enhance a relationship with a private client. This engages the lawyer in representing “differing interests” and could create a risk that the Village Attorney’s own financial or business interests could adversely influence the lawyer’s concurrent representations of the private client and the Village.

10. If a reasonable attorney would conclude, based on the factors discussed, that there is a “significant risk” that the professional judgment of the Village Attorney when acting on behalf of private clients might be adversely affected by a desire to advance one or the other of the competing interests of the private client or Village, then the representation of the private client in Town Justice Court would be permissible only if the conditions of Rule 1.7(b) are met. Three are relevant here: first, that the Village Attorney reasonably believes that the lawyer will be able to provide competent and diligent representation to both the Village and the private client; second, that the representation is not prohibited by law; and third, that each affected client gives informed consent, confirmed in writing. We note that a number of state and local laws, regulations, codes, and

ordinances govern the conduct of municipal officials, any one which, if proscribing the proposed conduct, would override the Rules. Our jurisdiction does not extend to interpreting these legal issues, so we assume for our purposes that no law prohibits the Village Attorney from representing private clients in the Town Court. On that assumption, we see no reason why, if the lawyer reasonably believes that the lawyer may competently and diligently represent the interests of the lawyer's concurrent clients, the lawyer may not seek informed consent from each client, confirmed in writing, to represent private clients in the Town Court.

**Rule 1.11**

11. Rule 1.11 sets forth restrictions on a lawyer currently serving as a public officer or employee. Rule 1.11(c) prohibits a lawyer from using confidential information about a person, acquired in the course of government employment, from representing a person in a matter in which the information could be used to the material disadvantage of that person. Rule 1.11(d) forbids a lawyer, subject to contrary law, from participating in a matter in which the lawyer participated personally and substantially while in private or nongovernmental practice, or from negotiating for private employment with any person involved as a party or a lawyer for a party in a matter in which the government lawyer is participating personally and substantially. Rule 1.11(f) says that a lawyer shall not: use a public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or a client if the lawyer knows or it is obvious that the legislative proposal is not in the public interest; use a public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or a client; or accept anything of value for the purpose of influencing the lawyer's action as a public official.

12. To anticipate every possible circumstances in which one or more of these proscriptions may come into play is not possible. The Village Law gives the mayor and its governing body powers over a variety of matters, on which presumably the Village Attorney may be called upon to advise. Village Law §§ 101 *et seq.* These powers may include adoption of budgets; setting of taxes and fees; zoning and building permits; village road maintenance, speed limits, and repair; local improvements; managing village properties; and the like. *Id.* It is our understanding that the overwhelming number of villages in New York are located within the boundaries of a single town, and that arrangements between these towns and villages vary widely. For example, some villages have their own police or village justices; the inquirer's village, it seems, does not. Apart from the facts set forth in the inquiry, we are not informed of the range of powers the village has reserved for itself.

13. Mindful of this limitation on our ability to set hard rules, we think a few obvious illustrations may be useful. For instance, a lawyer who acquires confidential information about a building zone matter involving a village resident may not use that information to the detriment of that resident owing to the interests of the lawyer's private client. A Village Attorney may not advise the Village on a matter involving property improvements in which the lawyer personally and substantially represented a private client on that same property, nor may the lawyer seek private employment from a client arising out of, say, a local ordinance in which the Village Attorney counseled the Village. A Village Attorney must forebear from advising a private client about a prospective local law of special interest to that client, nor seek to use the lawyer's influence as Village Attorney to affect an outcome in the Town Court or any other tribunal (including a zoning board) on behalf of a private client. It goes without saying that the Village Attorney may not accept anything of value to influence the lawyer's exercise of that role.

## **CONCLUSION**

14. 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.

(03-19)