

STATE OF NEW YORK: COUNTY SUFFOLK  
COUNTY BOARD OF ETHICS  
Advisory Opinion and Training Memorandum 2016-24  
February 15, 2017

**TOPIC: RENTALS**

*PLEASE TAKE NOTICE: Applications requesting the modification, clarification, or withdrawal of this Advisory Opinion and Training Memorandum must be made in accordance with Suffolk County Board of Ethics (hereinafter the “Board”) rules unless an application for the revision or withdrawal of an Advisory Opinion is timely received, it shall become final. Nothing shall prohibit the Board, on its own motion, from reconsidering, revising or withdrawing an Advisory Opinion at any time.*

*This Advisory Opinion and Training Memorandum was issued upon hypothetical facts intended to facilitate compliance and education. Public servants of Suffolk County are encouraged to submit direct requests to the Suffolk County Board of Ethics.*

**INTRODUCTION:**

On October 18, 2016, Suffolk County Legislator ██████████ submitted a “formal” written request to the Board for an advisory opinion. Subsequent to the October 18, 2016 request, counsel for the Board participated in a conference call with Legislator ██████████ on November 23, 2016. During that conversation, Legislator ██████████ broadened his request asking that the opinion provide guidance to all employees. The Board concurred in accordance with the Board’s training and education responsibilities. As a result, this Advisory Opinion is also entitled “Training Memorandum.” Additional preparation time was necessary to conduct further research and fact-finding and Board consideration to insure that the letter provides appropriate county-wide guidance.

Fact-finding and analysis were concluded and this advisory opinion was presented to the Board for review. It was approved on February 15, 2017.

**Summary:** Upon consideration of the hypothetical facts raised by Legislator ██████████ and presented to the Board<sup>1</sup>, the Board advises 1) that in certain contexts, the rental of property, both realty and personal, between and among public servants<sup>2</sup> and/or members of the public creates an appearance of impropriety that is inherently problematic and is prohibited, and 2) social interactions and personal relationships between and among public servants and members of the public, including but not limited to, assistant district attorneys and defense attorneys, do not violate the Suffolk County Code of Ethics.

**Analyzed Laws and Rules:** Suffolk County Administrative Code XXX, New York State Bar Association Ethics Opinions and Suffolk County Code Chapter 77.

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<sup>1</sup> The Suffolk County Administrative Code provides that advisory opinions “. . . shall be issued only with respect to proposed future conduct or action by a public servant.” Suffolk County Administrative Code § A30-3(B). Further, the Board “may amend a previously issued advisory opinion after giving reasonable notice to the public servant, that it is reconsidering its opinion.” *Id.* The opinion of the Board will “. . . be based on such facts as are presented in the request.” Suffolk County Administrative Code § A30-3(A).

<sup>2</sup> Section 77-1 of the Suffolk County Code of Ethics defines a public servant as “all officials, officers and employees of the County, whether paid or unpaid.”

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**Questions Presented:**

The following questions were presented by Legislator [REDACTED]:

1. “Would it be a violation of the County’s Ethics Code for an Assistant District Attorney to rent out any type of vehicle, boat, home, office or real property to defense attorneys who represent criminal defendants who have cases, have had cases, or will have cases that are prosecuted either directly by them or others that are supervised by them?” **Yes. See discussion below.**
2. “What is the applicability of the answer to all County public servants, i.e. officials, officers and employees of the County?” **It is applicable to all County public servants.**
3. “Is it a violation of the Suffolk County Code of Ethics for Assistant District Attorneys to socialize with members of the defense bar?” **No. See discussion below.**
4. “Is it a violation of the Suffolk County Code of Ethics for public servants, i.e. officials, officers and employees of the County to socialize with other public servants, i.e. officials, officers and employees of the County?” **No. See discussion below.**

The received inquiries did not identify a particular county employee nor was it a supervisory official request; therefore, if relied upon, this opinion does not create an affirmative defense in accordance with Section A30-3(B) of the Suffolk County Administrative Code.

The current Suffolk County Code of Ethics was adopted by the Suffolk County Legislature and took effect March 28, 2012. Hence, this Advisory Opinion and Training Memorandum relates to proposed future conduct of public servants as set forth in the questions above.

**Laws and Secondary Sources Analyzed**

- Suffolk County Code of Ethics §77-3(B),(C), (I), 77-4(A) 77-5(B), (D)
- People v. Adams, 20 N.Y.3d 608, 987 N.E.2d 272 (2013)
- New York State Bar Association Committee on Professional Ethics (ethical opinions)
- Schumer v. Holtzman, 60 N.Y.2d 46, 454 N.E.2d 522 (1983)
- People v. Zimmer, 51 N.Y.2d 390, 414 N.E.2d 705 (1980)
- New York Rules of Professional Conduct (Rule 1.7)
- Michigan State Bar Opinion (#RI-82)
- SCBE Advisory Opinion 2016-9

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**Analysis – Questions 1 & 2**

The Suffolk County Code of Ethics §77-3(B)-(C) provides:

- B. No public servant shall engage in any business, transaction or private employment, or have any financial or private interest which is in conflict with the proper discharge of his or her official duties.
- C. No public servant shall use his or her official position or office, or take or fail to take any action, in a manner in which he or she knows or has reason to know may result in a personal financial benefit to himself or herself, a person or firm associated with the public servant, a customer or client of the public servant or any person from whom the public servant has received a gift or any goods or services for less than fair market value, during the preceding 12 months.

The renting of a vehicle or boat or leasing office space or a home owned by a public servant to another, or by the public servant's spouse or domestic partner or un-emancipated child, or by a firm in which the public servant or spouse or domestic partner or un-emancipated child has more than a 5% interest, constitutes engaging in a business or transaction by the public servant. Engaging in such business or transaction is prohibited by the Code of Ethics if such business or transaction conflicts with the "proper discharge of the public servant's official duties." There is nothing inherent in the private business of renting real or personal property that conflicts with the proper discharge of the public servant's official duties.<sup>3</sup>

However, in certain contexts, the rental of property, both realty and personal, by public servants to members of the public or to other public servants, creates an appearance of impropriety that will interfere with the proper discharge of duties by the public servant. Accordingly, it is the opinion of this Board that when such an appearance will likely arise it is adverse to the Code of Ethics and is prohibited.

It is well established in New York case law that an appearance of impropriety can "discourage public confidence in our government and the system of law to which it is dedicated." People v. Adams, 20 N.Y.3d 608, 987 N.E.2d 272 (2013). Public knowledge of a personal business or transaction between an attorney representing the County and the opposing litigant's attorney will "discourage confidence" in government. Take for example the request for consideration and negotiation of a plea offer by a criminal defense counsel made on behalf of a client to an assistant district attorney.

**If the assistant district attorney rents, or seeks to rent, real or personal property to that defense counsel the appearance of impropriety arises and interferes with the proper execution of justice. The same consideration applies when a prosecutor offers to rent a boat, vehicle or other personal or real property to a criminal defense attorney not then representing a criminal defendant, but who regularly appears in proceedings in opposition to the prosecuting attorney or other prosecutors who are supervised by the prosecuting attorney. This creates a palpable appearance of impropriety even if intended not to influence. (The same occurs if an assistant county attorney seeks to rent property to the attorney for a litigant suing**

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<sup>3</sup> An example of a business that is inherently in conflict with public duties would be a jury selection advisory service owned by a county attorney that sells services to attorneys litigating against the County.

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**the County of Suffolk). The very appearance of impropriety even without proof of ill motive calls into question the public's perception of the fundamental integrity of the criminal justice system thus interfering with the proper discharge of their official County duties even if not required to be voluntarily disclosed by the Rules of Professional Conduct applicable to attorneys.**

Likewise, the rental of property by a public servant to another public servant is inherently problematic when the public servant has the ability to take adverse action against the renting public servant who is party to the transaction. Examples include when a supervisor has the authority to grant or deny a promotion, or conducts an evaluation of the other employee party to the transaction. A further example of the creation of an appearance of impropriety is when a supervisor who has rented real or personal property to another employee who can appoint, or recommend the appointment of the other County employee to a promotional position.

In all of these contexts the public perception can be expected to assume that the employee who owns the property (rentor) intends to favor the other party who rents the property because it benefits the rentor. The aforementioned examples are illustrative and are not meant to limit when the appearance of impropriety prohibits a compensable transaction between public servants, and members of the public, in other contexts. The Suffolk County Code of Ethics is designed to foster public trust in government - the appearance of impropriety arising from these transactions violates the Code.

Moreover, if such prohibited conduct is foreseeable, a public servant is required to recuse himself, promptly inform his immediate supervisor, file a recusal statement with the Board, and refrain from participating further in the particular matter. Suffolk County Code § 77-7; See also SCBE Opinion 2016-9.<sup>4</sup>

Public trust in Suffolk County Government is one of the stated purposes of the Ethics Code. Employees of the County as public servants share in the responsibility to insure that the public perceives that governmental officers and employees perform their duties in accord with that purpose.

### **Analysis – Questions 3 & 4**

Finally, the Suffolk County Code of Ethics does not expressly limit and/or prohibit the social interactions between and among public servants and members of the public, including assistant district attorneys and defense attorneys who represent criminal defendants in the County. See Suffolk County Code § 77-3. It should be noted that the only per se limitation set forth in the County Ethics Code regarding assistant district attorneys is §77-7(A) which states, “no political party officer shall be eligible to serve as an elected official, department commissioner, **assistant district attorney** or member of any board, commission, authority, or public benefit

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<sup>4</sup> Aside from avoiding the appearance of impropriety, §77-3 (C) addresses use of the authority of a public office to take, or decline to take action in exchange for financial gain. Such violations require the production of facts to substantiate the impropriety of the rental. For example, if a County employee were to decline to report a potential disciplinary matter against a second County employee in exchange for the second County employee's rental of an asset owned by the first County employee then a violation of these sections would occur. Barring the specific relationships noted above, the mere existence of the rental without additional facts is insufficient to constitute a violation of the Code.

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corporation whose members are appointed by the County Executive or County Legislature.” However, the Board counsels that care must be taken to insure that the social interaction does not rise to the level of an appearance of impropriety.

Dated: Great River, New York  
02/15/2017

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Linda A. Spahr - Chair