

*NEW YORK STATE BAR ASSOCIATION*  
*Committee on Professional Ethics*

Opinion #397 - 6/10/75 (33-75)

Topic: Conflicts; criminal defense

Digest: Member of state investigation agency may not practice criminal law

Code: Canon 9; DR 5-105; EC 8-8, 9-2

QUESTION

May a lawyer who is a member of a state investigation agency charged with the investigation and enforcement of criminal laws in his private practice defend criminal matters?

OPINION

An attorney may not act as defense counsel in criminal proceedings while serving as a member of a state investigation agency charged with the investigation and enforcement of criminal laws. The agency is a public law enforcement agency encompassing many of the functions of a public prosecutor. It investigates matters and makes policy decisions dealing with law enforcement agencies, prosecutors and other public officials. A public prosecutor is prohibited from representing defendants in criminal matters not only by reason of the possible conflict of interest which may impair the independent professional judgment of the lawyer, but also because a lawyer should avoid even the appearance of professional impropriety. DR 5-105; Canon 9; EC 9-2; EC 8-8.

Even where the attorney appointed to the investigation agency may be representing defendants in criminal matters in other jurisdictions, in a Federal Court or in appellate courts, these considerations must determine his conduct. Prosecutors are granted assistance by police departments, as well as the prosecuting attorneys of other cities and counties throughout the country. Such a practice is of benefit to the public and to the administration of criminal justice. If a prosecutor or a member of an investigation agency indulged in the practice of defending criminals, even in another jurisdiction, this helpful cooperation might be withdrawn. The appearance of a prosecutor, an agent of the state, representing a criminal defendant and thereby opposing the state, might well consider that there would be a presumption of influence or conflict in the eyes of the public. Even the prosecutor himself must be aware that the defense of criminal matters might develop an attitude detrimental to his duties as a member of an investigation agency. ABA 30 (1931).

The position of a member of an investigation agency is similar to that of a prosecutor or a county attorney performing similar functions. Recent opinions have found that representing a defendant in a criminal matter by a county attorney is improper. N.Y. State 257 (1972); N.Y. State 367 (1974); cf. ABA Inf. 1285 (1974).