



Committee on Professional Ethics

Opinion #533 - 6/8/81 (74-80)

Topic: Conflict of Interest;
Public Defender

Digest: Where public defender represented client at trial, another member of public defender's office may not represent client on appeal where it is necessary to attack competence of trial counsel.

Code: EC 5-1, 5-2, 7-1, 9-2;
DR 5-101, 5-105(D)

QUESTION

May a public defender represent a client in an appeal based upon ineffective assistance of trial counsel, where the trial was conducted by another lawyer in the public defender's office who has since left the office?

OPINION

It is a lawyer's duty to exercise professional judgment independently and zealously within the bounds of the law, solely for the client's benefit, and free of compromising influences and loyalties. EC 5-1; EC 7-1. This is not only the lawyer's duty, but also the client's right and the public's expectation. See EC 9-2. With respect to the defense of the indigent persons, the Bar bears a particular responsibility to see that there is no impropriety and no appearance of impropriety. N.Y. State 315 (1973).

Where a lawyer, as the basis for an appeal, must attack his own competence as trial counsel there is obviously a personal interest that is fundamentally at odds with the client's right to impartial and zealous representation -- and the spectre of malpractice litigation strains such a relationship even further. See N.Y. State 275 (1972). Public confidence in our justice system must suffer when a lawyer, relying on his own woeful incompetence at trial, secures or even urges reversal of a criminal conviction. In such circumstances, the private interest as well as the public interest are best served by impartial judgments regarding prosecution of the appeal. See Anders v. California, 386 U.S. 738 (1967).

This result is unaffected by the fact that there may be several attorneys in the office of the public defender, or that the particular trial counsel in question has left that office. As we have held previously, the public defender and his staff are considered as one continuing firm; if it is improper for one staff member to represent a client in a particular matter, all are subject to the same prohibition. See, e.g., N.Y. State 497 (1978), N.Y. State 462 (1977) and N.Y. State 313 (1973); see also, DR 5-105(D).

For the reasons stated, the question posed is answered in the negative.
