



**NEW YORK STATE BAR ASSOCIATION**

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**Committee on Professional Ethics**

**Opinion 587 — 12/15/87 — (11-87)** Topic: Public defender; Private clients; Appearance of impropriety.

**Digest:** Proper for a part-time public defender, contacted directly for private representation, to continue such representation even though application for public defender assistance is later made. Proper for a part-time public defender to represent privately a person who contacted the office of public defender only when, after diligent efforts, the client is unable to find other qualified counsel.

Modifies N.Y State 165 (1970),  
173 (1970) and 260 (1972)

**Code:** Canon 9;  
EC 9-2.

**QUESTION**

May a part-time Public Defender ethically accept a suspect/accused as a private client in the following circumstances:

1. When a criminal defendant contacts a part-time Public Defender for private representation, but also desires to determine whether appointed representation is available?
2. When a part-time Public Defender recommends that a proposed private client first apply for appointed representation?
3. When a proposed Public Defender client, after being found ineligible for appointed representation, is unable after reasonable efforts to find other

qualified private counsel willing to take the case on financial terms the client can afford?

### OPINION

The questions posed concern the ethical duties of a part-time Public Defender who is contacted for private representation of a suspect/accused. In the first two situations, we are advised that the prospective client has sought out a part-time Public Defender for private representation based upon the reputation of the attorney, a third-party recommendation, or other similar factor. The initial contact with the attorney has not resulted simply from an application for Public Defender representation. At the same time, either the prospective client or the attorney has felt it appropriate to exhaust the possibility that Public Defender assistance might be available. In the inquirer's county, the Court, not the Public Defender's office, determines an applicant's eligibility to receive Public Defender's assistance. In the third situation, the prospective client, having been found ineligible for Public Defender's assistance, has tried without success to obtain other private counsel, and then has requested private representation by an attorney who is a part-time Public Defender.

In addressing these questions, we start with the general principles applicable to private representation by part-time Public Defenders. The past opinions of this Committee have concluded that a part-time Public Defender may engage in private criminal defense work, at least when "the client had never requested the services of the public defender's office." N.Y. State 173 (1970). This Committee has stated, however, that it would not be ethically proper for a part-time Public Defender to accept a private retainer from a client who had contacted the office for assigned representation.

In N.Y. State 165 (1970), this Committee focused on the concern that the office of Public Defender not be perceived as a feeder in building a private law practice. Relying on Canon 9 and EC 9-2, the Committee concluded that subsequent private representation by a part-time Public Defender who had been contacted by an accused seeking assigned representation "would clearly undermine confidence in the integrity of the profession." The Committee was of the opinion that safeguards to assure that the accused was advised of the right to select other counsel, and to establish the voluntariness of the decision to select a Public Defender as a private counsel, were insufficient to protect against an appearance of impropriety. The Committee stated that the only way to dispel the impression of possible impropriety was to forbid any such

private representation of anyone contacting the Public Defender for assigned representation.

In N. Y. State 260 (1972), the Committee adhered to its firm rule against subsequent private representation of any client who originally sought Public Defender representation. What was significant was that "the client's initial contact was with the public defender's office," a circumstance that the Committee concluded might give rise to a suspicion of impropriety if any member of the office were later retained as private counsel for the client.

The professional ethics committees of other states have expressed similar concerns in response to similar inquiries. South Carolina Bar Opinion 1-79; 23 South Carolina Bar Transcript 1979, at 11; indexed in Maru's Digest (1980) at No. 12733 (a public defender may not refer a criminal defendant to his law partner). In Oregon, the State Bar Committee has stated that a part-time public defender ethically may accept private employment so long as the suspect/accused contacts the attorney directly and the attorney does not use the situation to solicit private employment. Oregon State Bar Opinion 220 (July 29, 1972); indexed in Maru's Digest (1975) at No. 9781. The Illinois Bar Committee permitted a part-time public defender to accept a private retainer from a person determined by the court to be ineligible for public assistance so long as the attorney is freely and independently employed. Illinois Bar Opinion 406 (1973), 62 Ill. B. J. 51 (1973), indexed in Maru's Digest (1975) at No. 8326.

The Committee believes the situations posed by the first two questions fall outside the rule prohibiting subsequent private representation by a part-time Public Defender. In each instance, the contact with the individual attorney was the result of independent factors, and not the consequence merely of a request to the office of the Public Defender or to a court for appointed representation. That the possibility of public assistance will also be explored, either at the client's or the attorney's suggestion, should not disqualify the attorney, nor compel the prospective client to seek other representation. Otherwise, a defendant will be deprived of choice of private counsel, or will be discouraged from applying for appointed representation.

As to the third question, the Committee recognizes that there may be circumstances where a prospective client may be found ineligible for appointed representation but may lack the ability to pay an up-front fee to qualified private counsel. For instance, the inquirer has cited an example of a person able to make weekly payments from a worker's compensation award,

but unable after reasonable inquiries to find qualified counsel willing to accept a retainer permitting periodic payments.

Where, after diligent inquiry, no other qualified attorneys are available to take the case on terms the prospective client can afford, then as a last resort, the part-time Public Defender may take the case as a private attorney. The concerns underlying N.Y. State 165 (1970), N.Y. State 173 (1970) and N.Y. State 260 (1972) no longer apply with the same force. Rather than securing an advantage from the office of Public Defender, the attorney is performing a service by providing representation to those of modest means.

For the reasons stated, the questions are each answered in the affirmative.

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