NEW YORK STATE BAR ASSOCIATION
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Committee on Professional Ethics

Opinion #427 - 2/25/76 (120-75)

Modified by #544

Topic: Indigent criminal defendants; representation

Digest: Improper for the administrator of such plan, assistant district attorneys or their partners and associates, the county attorney or assistant county attorneys, members of the county board of supervisors and their partners and associates, or probation officers to participate in such a plan; not per se improper for village or town attorneys or their partners and associates to participate in such a plan.

Code: Canons 5, 9
EC 2-25, 2-29
DR 5-105(D)

QUESTION

Where a county has a plan to provide representation of indigent criminal defendants pursuant to Article 18-B of the County Law, may the plan's administrator, assistant district attorneys or their partners or associates, the county attorney, assistant county attorneys, members of the county board of supervisors and their law partners, probation officers, town or village attorneys or their partners and associates accept assignments under the plan?

OPINION

One of the most solemn responsibilities of the legal profession is its duty to make qualified counsel available to criminal defendants who are financially unable to employ counsel independently. The Code specifically encourages involvement by lawyers in plans to aid indigent defendants. EC 2-25; EC 2-29. On the other hand, Canon 5 of the Code, and the ethical considerations and disciplinary rules thereunder, demand that lawyers guard against patent or potential conflicts of interest in particular circumstances, and Canon 9 cautions that lawyers must strive to avoid even the appearance of professional impropriety. Thus, there are situations where representation of indigent criminal defendants by particular individuals who hold public office may be improper.

This Committee has dealt with the question of private criminal practice by assistant district attorneys, the county attorney or assistant county attorneys, and members of the county board of supervisors in a great number of prior opinions. In each case, the Committee has concluded that such practice would be improper. See, e.g., N.Y. State

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40 (1966); N.Y. State 257 (1972), N.Y. State 424 (1975), and references cited therein. Since general private criminal practice has been denied to these officers, the prohibition would encompass practice as assigned counsel to indigent criminal defendants. Furthermore, this Committee has consistently applied DR 5-105(D) disqualifying partners or associates of most of these officers where the officer himself would be disqualified. See, e.g., N.Y. State 426 (1976) and references collected therein; cf. N.Y. State 149 (1970). The usual rule is equally applicable to partners and associates of members of the county board of supervisors. Furthermore, the rules of practice of at least one department specifically prohibit the assignment of district attorneys and assistant district attorneys in proceedings described in Judiciary Law, Section 35 (1)(a) when the petitioner is financially unable to retain counsel. 22A N.Y.C.R.R. Section 822.1, Rules of Practice of the Appellate Division of the Supreme Court, Third Judicial Department.

This Committee has likewise dealt with the question of criminal practice by Village and town attorneys on a number of occasions. In the case of town attorneys, it has been held that they may practice criminal law without conflict of interest or appearance of impropriety if:

(1) they have no statutory or other responsibility for prosecution of criminal proceedings on behalf of the town or duties closely related thereto;

(2) they do not represent private clients before a Town Justice in the town they represent; and

(3) a violation or construction of an ordinance of the town is not involved.

See N.Y. State 315 (1972); N.Y. State 234 (1972); ABA Inf. 1045 (1968); ABA Inf. 1111 (1969), and reference cited therein. This reasoning applies equally to the question of criminal practice by village attorneys. Cf. N.Y. State 184 (1971). Thus, in those enumerated instances where it is proper for village or town attorneys to practice criminal law, it is also proper for them to participate in a County plan for representation of indigent defendants. As for the partners and associates of village or town attorneys, the usual rule as stated above is applicable.

This Committee has recently examined the question of acceptance of referrals from a lawyer referral service by an attorney associated with the direction or administration of such a plan, and the acceptance of referrals by members or associates of the lawyer's firm. See N.Y. State 426 (1976). The Committee there concluded that it was improper for an attorney associated with the direction or administration of a lawyer referral service to accept referrals from that service, and that partners or associates of that attorney were similarly disqualified.

This Committee has never dealt with the question of participation in a County plan for representation of indigent defendants by probation officers. Nevertheless, this too would appear to be improper. This case is distinguishable from that presented in N.Y. State 378 (1975)

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wherein this Committee dealt only with representation of defendants in criminal cases when the attorney's spouse was a probation officer. In the case of the probation officer himself, it is clear that he represents the authority of the State, and he therefore cannot represent anyone being prosecuted by a public authority.