



Committee on Professional Ethics

Opinion #313 - 11/16/73 (44-73)

Modified by 502

Topic: Conflict of Interest;
Former prosecutor acting
as a public defender

Digest: Former assistant district
attorney should not appear
as trial counsel or
attorney of record for a
defendant indicted during
attorney's public employment.

Code: EC 9-3;
DR 5-105(D); 9-101(B)

QUESTION

May an assistant district attorney after leaving that position and becoming an attorney of a county legal aid society which acts as public defender appear as attorney of record for persons indicted during the period of his public employment?

OPINION

DR 9-101(B) deals with avoiding even the appearance of impropriety and provides that:

"A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

Within the meaning of this rule an assistant district attorney is considered to have substantial responsibility in connection with matters resulting in indictment during the period he held that office. See, N.Y. State 303 (1973); DR 5-105(D); N.Y. State 260 (1972). It is, therefore, clear that he may not represent any person so indicted either as trial counsel or as attorney of record. N.Y. State 52 (1967); ABA 134 (1935); ABA Inf. 647 (1963); cf. Public Officer's Law Section 73(7).

For this purpose the district attorney's staff as well as the public defender's staff are each subject to the same rule as would apply to a partnership, namely "if it is improper for one member or associate of a firm to represent a client in a particular matter, then all members and associates of that firm are also subject to the same prohibition." N.Y. State 260 (1972); N.Y. State 227 (1972); N.Y. State 254 (1972); N.Y. State 214 (1971); ABA 104 (1934).

However, in addition to being a matter of professional conduct the disqualification of a public agency is a matter of law to be determined by the courts. United States v. Standard Oil Co., 136 F.Supp 345 (SDNY 1955); People v. Wilkins, 28 N.Y. 2d 53 (1971). This Committee does not pass upon questions of law, however, even if the public

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defender's staff is not disqualified as a matter of law, the public defender has a minimal ethical duty to promptly notify the Court of the facts so that it may take appropriate action.

This opinion, of course, does not prohibit the assignment of counsel not associated with the public defender or the employment of special counsel. See N.Y. 227 (1972).
