

ADVISORY ETHICS OPINION 96-02

SYNOPSIS:

It is permissible for an assigned attorney to represent a criminal defendant even though the defendant (a) is subject to payment of a fee to a special fund for Public Defenders only upon being found guilty of an offense (DWI cases), and (b) may be required to pay part or all of the costs of representation by assigned counsel by order of court entered either at the time of assignment of counsel or subsequent to the assignment, including cases where the defendant is accused of violating probation for not having paid court-ordered sums to the Public Defender Special Fund.

FACTS:

A Public Defender Special Fund has been established by the Vermont General Assembly.¹ Control of appropriations from this fund remain vested in the General Assembly, either by annual appropriation or by delegation to the Secretary of Administration of the power to expend excess receipts from the fund as the Secretary may determine within the limits prescribed by the General Assembly.² The fund is required to be managed by the Director of Finance and Management; the monies in the fund are held by the State Treasurer.³

Monies deposited to the fund come from co-payments, reimbursements and assignment fees required to be paid by persons who receive representation from Public Defenders, assigned counsel contracted attorneys and ad hoc assigned counsel pursuant to Chapter 163 of Title 13.⁴

In addition, the Public Defender Special Fund is to receive the sum of \$50.00 from each defendant convicted of a violation of 23 V.S.A. 1201 (DWI) after March 21, 1996, whether the defendant was unrepresented or was represented by assigned counsel or by privately retained counsel.⁵ While Section 1210 (i) of Title 23 provides for the \$50.00 surcharge to be sent by the court to the office of the Defender General, in fact the surcharges are transmitted directly to the office of the State Treasurer according to the Defender General's office.

QUESTIONS PRESENTED:

1. Whether a conflict of interest exists where counsel are assigned to represent accused persons who are required to pay money to the Public Defender Special Fund, including persons alleged to have violated a court-ordered condition of probation that requires the probationer to pay reimbursement to the Public Defender Special Fund?
2. Whether a conflict of interest exists with respect to assigned counsel by reason of the requirement in Section 1210 (i) of Title 23 that persons convicted of DWI pay a \$50.00 surcharge to the Public Defender Special Fund through the office of the Defender General?

DISCUSSION:

Disciplinary Rules 5-101(A) and 5-103(A) of the Code of Professional Responsibility are implicated by the questions presented. DR 5-101(A) provides in pertinent part:

Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

DR 5-103(A) provides in pertinent part:

A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client

¹ 13 V.S.A. Section 5239(a) (Supp. 1996).

² 13 V.S.A. Section 5239(b)(4) (Supp. 1996).

³ 13 V.S.A. Section 5239(b)(1) (Supp. 1996).

⁴ 13 V.S.A. Section 5239(a) (Supp. 1996); see 13 V.S.A. Sections 5236, 5238, 5240 and 5255 (Supp. 1996).

⁵ 13 V.S.A. Section 5239(a) (Supp. 1996); 23 V.S.A. Section 1210(i) (Supp. 1996).

In addition issues of due process of law also are triggered by the scheme adopted by the Vermont General Assembly.

Canon 5 of the Code of Professional Responsibility requires a lawyer to "exercise independent professional judgment on behalf of a client." It is suggested that a Public Defender's fiduciary duty of unconflicted loyalty and independent judgment may be impaired where the result of a successful defense may be a diminution of the special fund monies, from which the public defender's salary or contractual compensation may in part be paid. For reasons described below we view this suggestion as too remote to raise an ethical issue.

Act No. 178 of the adjourned session of the Vermont General Assembly, approved May 22, 1996, provided that \$221,756, or approximately six percent of the funds appropriated for the Defender General's public defense budget, come from "special funds."⁶ More than 3.5 million dollars of the Defender General's appropriation for public defense in this fiscal year is to come from a combination of the general and transportation funds of the state and from federal funds (the last source comprising less than one percent of the total). The appropriation for assigned counsel, however, contained no provision for special funds to be a source of those budgeted monies.⁷

Given the duties of an attorney to represent his or her client zealously within the bounds of the law (DR 7-101), it is difficult to fathom the proposition that a Public Defender or a contracted defender would compromise the proper representation of a probationer – or, for that matter, any criminal defendant – by reason of the addition or non-addition of monies to the Public Defender Special Fund. The analysis might be different if the special fund was a significantly larger part of the Public Defenders' budget or if the salaries of individual Public Defenders were affected directly by deposits to the fund.

As observed in E.C. 2-25 of the Code of Professional Responsibility, "The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer"⁸ This obligation extends to "each lawyer," whether employed as a Public Defender on salary or under contractual arrangement. Thus, the advocacy for a probationer not to have to pay for legal services in the face of a charge of violation of court-ordered payment of legal fees does not rise to the level of conflict of interest proscribed by DR 5-101 or DR 5-103 insofar as a Public Defender is concerned. The matter of payment for such legal services is not compromised by the prospect of the individual probationer not having to pay a sum to the Public Defender Special Fund, for the salaried Public Defender and the contracted Public Defender each have separate and enforceable rights to the compensation due them by virtue of their contracts with the State. In other words, there is nothing in the statutory scheme of the State of Vermont that makes payment of compensation to Public Defenders dependent on the payment of sums to the Public Defender Special Fund.

Rulings on questions of due process of law, where judicial officials received compensation based on the decisions rendered by them, involve similar concepts but are distinguishable. For example, where an official was paid a fee upon issuance of a search warrant, but was not paid a fee if a search warrant was refused, the statute was held to violate the federal constitution's due process clause.⁹ Likewise, a state statute was ruled unconstitutional on due process grounds where the court official exercised judicial powers in addition to executive powers, and the major part of the income of the municipality from which the official was paid was derived from court-imposed fines, forfeitures, fees and costs.¹⁰ Courts in at least five other jurisdictions also have ruled statutory schemes that authorized fees to be paid to presiding judicial officials in the event of convictions to be invalid.¹¹

The existence of a pecuniary interest in the outcome of the proceedings has been regarded as the key element in ruling the above statutory schemes to be violative of due process. If a judicial officer has a property or pecuniary interest that is dependent on the outcome of the litigation, the judge must be disqualified from participating in the litigation. If the governing state statute confers such a pecuniary or property interest on the judge, no matter who that person is, then the statute will be declared to be unconstitutional.¹²

A similar concept is found in E.C. 5-1, 5-2 and 5-3. Thus, a lawyer should not accept or continue with representation of a client if the attorney's "personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or the services to be rendered the . . . client." Property rights, proprietary interests or financial interests in the outcome of litigation other than reasonable contingent fees in civil cases are the types of situations that lawyers must avoid.¹³

⁶ 1995 Act No. 178, Section 61 (Adj. Sess.).

⁷ 1995 Act. No. 178, Section 64 (Adj. Sess.).

⁸ V.S.A. Admin. Orders & R., p.464 (1986).

⁹ *Connally v. Georgia*, 429 U.S. 245 (1977).

¹⁰ *Ward v. Monroeville*, 409 U.S. 57 (1972) (Ohio statute).

¹¹ See 16A Am. Jur. 2d, Constitutional Law Section 856, at 1077-79 (1979).

¹² *Ibid.*

¹³ See V.S.A. Admin Orders & R., Code of Prof. Resp. Canon 5, E.C. 5-2, 5-3, 5-4, 5-7 (1986).

The Public Defender Special Fund does not confer any property or proprietary right or pecuniary interest in any lawyer or class of lawyers. Indeed, use of the special fund is authorized only upon annual appropriation by the General Assembly. In addition, any interest earned by the fund is required to be placed in the general fund. Thus, the payment of compensation to salaried or contracted Public Defenders is not directly affected by the required payments of sums to the special fund, whether in the context of probationers who have been ordered to make such payments and who are charged with violations of court-ordered reimbursements or in the context of persons convicted of DWI. Nor is the ad hoc assigned attorney's compensation affected by whether or not the special fund is augmented by the outcome of any particular case.

Moreover, as noted above, the failure of an attorney to render effective services on behalf of a criminal defendant because of the Public Defender Special Fund provisions in the Vermont statutes would constitute a violation of DR 7-101 of the Code of Professional Responsibility, which requires an attorney to represent a client zealously within the bounds of the law.

CONCLUSION:

The answer to each of the questions presented is "No."