

FORMAL OPINION NO. 19\*

In the month of June, a District Judge appointed an Idaho lawyer to represent an indigent defendant charged with criminal offense. The lawyer advised his client to enter a plea of "not guilty" solely for the purpose of allowing the defendant to work in the summer months so he could help support his family.

The defendant was admitted to bail and did some work. In the next term of Court the following Fall, the lawyer advised his client to enter a plea of guilty and the defendant was sentenced in November of that same term of Court.

The Committee has been asked to give its opinion on the following questions:

1. Whether the attorney was unethical in pleading the defendant not guilty merely to delay punishment?
2. Whether the attorney should disclose to the Court facts from which it might be inferred that the defendant was no longer indigent.
3. Whether there is an ethical reason the Court should refuse to award the Court appointed attorney a reasonable attorney fee for his services.

In the limited time the Committee was given to decide these questions, no prior decision or opinion has been discovered to provide an easy solution to the above novel questions.

It is then necessary to examine the basic position of counsel appointed by the Court to represent an indigent defendant.

In England a barrister can not refuse a brief presented to him, and under their rules a barrister is not at liberty to refuse to represent a defendant in a criminal action.

In the United States it is recognized that a lawyer has a right to refuse to represent a client either in a civil or criminal action.

However, the right of a lawyer in the United States to choose his own clients has been practically abrogated in the case of the Court appointed lawyer to represent an indigent defendant in a criminal action.

Canon 4 imposes this obligation upon lawyers:

"A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf."

Thus, the State creates the relationship of attorney and client in such cases. Once the client-attorney relationship is established, the Court appointed lawyer has the same duties and responsibilities toward his client as such a relationship established by private contract.

It is not unethical for a lawyer to advise his client to enter a plea of not guilty even though the lawyer may have a personal opinion of the guilt of the accused.

Canon 5 states in part:

"It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound, by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law . . ."

A discussion of the pleading of "not guilty" is found in Costigan, Cases on Legal Ethics, at page 311:

"The question in the American or English Court is not whether the accused be guilty. It is whether he be shown to be guilty, by legal proof, of an offense legally set forth." George F. Hoar, Oratory, 29 Scribner's Magazine, 756, 758.

"In criminal cases, it appears to me to be most advisable to exhort a prisoner to plead not guilty, as, on an investigation of his case, it may turn out that the offense for which he has been charged capitally may amount to a misdemeanor only." Par, J., in Godefroy v. Jay, 5 Moore & Payne, 284, 300 (1831).

"Hence it is that guilty persons are generally thought none the worse of because they plead 'not guilty.' A shrewd appreciation of the principles of our criminal law, as well as not a little wit, was shown in the answer of the prisoner who, when asked to plead guilty or not guilty replied, 'Faith, and how can I tell until I've heard the evidence?'" Showell Rogers, The Ethics of Advocacy, 15 Law Quar. Rev. 259, 261.

We do not believe that justice was thwarted or denied by the reasonable delay sought by counsel in this instance to enable his client to work the summer months before entering the plea of guilty.

Court appointed attorneys throughout the United States have been often criticized for urging their clients to enter a quick plea of guilty. A reasonable delay may result in the discovery of a legal defense, or mitigating or extenuating circumstances.

In connection with a reasonable delay in the prosecution of criminal actions the Idaho Supreme Court in the case Schrom v. Cramer, 76 Idaho 1, has held that the constitutional and statutory guarantees of a defendant accused of crime are not violated when he is bound over for trial one term of Court, informed against the next term of Court and then tried the following term of Court.

The first question is answered in the negative.

The second question is also answered in the negative under the limited facts given the Committee.

When a Court appoints an attorney to represent an indigent person it is the Court that has established the indigent status of the accused. The Court appointment does impose upon the attorney the duty to properly represent the accused, but it does not impose upon the attorney the additional duty to look to his client for his fees or to be a collection agent for the State. If the attorney had actual knowledge that his client inherited, received or earned a substantial sum of money and the accused was no longer indigent, the attorney should report this information to the Court so the attorney can receive from the state the fees the attorney had earned to date and the Court could order the accused to hire his own attorney. However, where it can only be inferred that the accused might no longer be indigent we do not see any duty on the Court appointed attorney to disclose this inference to the Court.

The third question propounded is also answered in the negative.

Section 19-1513, Idaho Code, provides:

"Appointment of counsel for accused.--Whenever upon the trial of a person in the district court, upon an information or indictment, it appears to the satisfaction of the Court that the accused is poor and unable to procure the services of counsel, the Court may appoint counsel to conduct the defense of the accused for which service such counsel must be paid out of the county treasury, upon order of the Judge of the Court, such sum as the Court may deem reasonable for the services rendered." (Emphasis ours.)

From the time the Court appointed counsel to represent the indigent defendant, the counsel was entitled to a fee from the State for his services. Having found that counsel conducted himself in an ethical manner we see no ethical reason why the Court should not order that he be paid a reasonable fee.

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\*This is an undated opinion. Idaho Code Sec. 19-1513 was repealed by S.L. 1967, ch. 181, Sec. 21.