**Opinion 14-152**

October 23, 2014

Digest:         Where legally permitted, a judge may decline to approve plea bargains that would require defendants to contribute money in an amount set by a district attorney to programs the district attorney chooses.

Rules:          Judiciary Law § 212(2)(l); Penal Law § 65.10; VTL § 1197(1)(a); 22 NYCRR 100.1; 100.2; 100.2(A); 100.3(B)(1); Opinions 10-196; 10-114; 10-113; 08-11; 00-95 (Vol. XIX); 93-58 (Vol XI); *People v Appel*, 141 AD2d 374 (1st Dep’t), *lv denied* 72 NY2d 915 (1988); *People v Warren*, 89 AD2d 501 (1st Dep’t 1982).

Opinion:

         An administrative judge states that judges within his/her jurisdiction have been asked to approve plea bargains that require a defendant to pay as much as $10,000 to the county’s Special Traffic Options Program for Driving While Intoxicated (“STOP DWI”) in return for a reduced sentence or a conditional discharge in satisfaction of a DWI charge. More generally, the inquirer has learned that prosecutors have “required that such payments be included as part of a conditional discharge,” and that even when a judge has refused to impose this requirement, one or more defendants have nonetheless made such payments prior to entering a plea. The inquirer is concerned that “sentences which involve donations are unlawful or not authorized by statute” in New York (*see* Penal Law § 65.10; *People v Appel*, 141 AD2d 374 [1st Dep’t], *lv denied* 72 NY2d 915 [1988]; *People v Warren*, 89 AD2d 501 [1st Dep’t 1982]).1 Accordingly, the judge asks whether judges may ethically decline to approve such plea bargains, when offered.

         A judge must uphold the integrity and independence of the judiciary (*see* 22 NYCRR 100.1), avoid impropriety and the appearance of impropriety in all the judge’s activities (*see* 22 NYCRR 100.2) and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (*see* 22 NYCRR 100.2[A]). A judge must also be faithful to the law and maintain professional competence in it (*see* 22 NYCRR 100.3[B][1]).

         The Committee has advised that judges must maintain their independence from prosecutors (*see* *e.g.* Opinions 10-113; 08-11; 00-95 [Vol. XIX]; 93-58 [Vol. XI]). Therefore, a judge “may not participate in a program devised by the District Attorney, which directs the manner in which the judge may reduce charges in traffic infraction cases in his or her court” (Opinion 93-58 [Vol. XI]), and “should not implement a procedure the District Attorney developed to facilitate defendants’ pleas to lesser charges in traffic matters that would eliminate the need for the District Attorney or a member of his/her staff to appear in the judge’s court” (Opinion 08-11). Likewise, although a judge may ask a criminal defendant any questions the judge has determined are legally permissible or legally required, including questions about a defendant’s immigration status, the judge should not accede to the district attorney’s request that the judge conduct plea allocutions in a particular manner and should not distribute notices furnished by the prosecutor to criminal defendants (*see* Opinion 10-196).

         Because a judge must exercise his/her own independent adjudicative functions, it would of course be inappropriate for a judge to “automatically” approve every plea bargain offered by a prosecutor, merely because the prosecutor offered it. Accordingly, the Committee concludes that a judge may, where legally permitted, decline to approve plea bargains that would require defendants to make contributions in amounts determined by the district attorney to programs determined by the district attorney.

         Moreover, if a judge determines that a particular fine, contribution, or donation required as part of a proposed plea bargain is unauthorized by law or is outside the permissible monetary parameters set by relevant statutes or case law, the judge must not approve the arrangement or otherwise impose an unlawful sentence (*see* 22 NYCRR 100.3[B][1]).

         The Committee cannot comment on whether the plea bargains described in the present inquiry are lawful because to do so would be beyond our authority (*see* Judiciary Law § 212[2][l]; *see also* Opinion 10-114).

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1Although the inquiring judge wonders whether approval of payments to a “pro-law enforcement” program such as STOP DWI might itself create an appearance of impropriety, the Vehicle and Traffic Law specifically provides that a county’s STOP DWI program, where established, “shall receive fines and forfeitures collected by any court, judge, magistrate or other officer within that county” for certain violations (VTL § 1197[1][a]).