

STATE OF TENNESSEE
OFFICE OF THE
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November 18, 2008

Opinion No. 08-175

Private Probation Companies

QUESTION

Are judges allowed to deny a private probation company, certified by the Probation Board, the right to do business in their courts?

OPINION

Judges have wide discretion to determine which qualified entity will supervise a probationer, provided that the determination is made impartially and on the basis of merit.

ANALYSIS

Under Tenn. Code Ann. § 40-35-302 (misdemeanor sentencing), a court may order an eligible defendant placed on probation to be supervised by any county probation service or private probation company that has been established for the purpose of supervising defendants convicted of misdemeanors. Tenn. Code Ann. § 40-35-302(f)(1) (Supp. 2008). Subsection (g) of this statutory provision sets out the qualifications an entity supervising misdemeanor probationers must meet. Additionally, the implementing regulations of Tenn. Code Ann. § 16-3-909 set forth certain requirements that private entities must satisfy in order to provide probation services in this State. *See* Tenn. Comp. R. & Regs. 1177-1-.03.

These provisions create minimum criteria that private probation companies must satisfy in order to qualify to do business with the criminal and general sessions courts. Nothing in them, however, entitles a qualified entity to a particular portion of probationary referrals made by the courts. This Office has previously opined that, pursuant to Tenn. Code Ann. § 40-35-302(f), “the judge clearly has the discretion to choose” which qualified entity will supervise a probationer, and has characterized this discretion as “wide”. *Op. Tenn. Att’y Gen. No. 99-029* (Feb. 17, 1999). Although Section 302 has since been amended, these amendments do not strip the trial courts of discretion in making referrals. *Compare* Tenn. Code Ann. § 40-35-302(f) (1997) *with* Tenn. Code Ann. § 40-35-302(f) (Supp. 2008). The provisions of Tenn. Code Ann. § 16-3-901 *et seq.* are addressed to the regulator of private probation services and do not operate against the

judiciary. Accordingly, this Office adheres to the opinion that judges have wide discretion to determine which qualified entity will supervise a defendant.

Although wide, the discretion of trial courts is not entirely unfettered. Tenn. Code Ann. § 40-35-302 itself forbids judges from having a personal interest in a private probation company. Tenn. Code Ann. § 40-35-302(g)(1)(H)(1). More broadly, the Code of Judicial Conduct speaks directly to the issue of referrals to private probation services. Canon 3 of the Code provides in part:

When a judge refers litigants to community resources as a condition or requirement relating to litigation, such referrals shall be made impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. For purposes of this provision, a “community resource” is any person or organization providing services such as, but not limited to: counseling services; driver education or traffic safety programs; mental health, substances abuse, or other treatment programs; parenting classes; private probation services, and similar types of services.

Tenn. Sup. Ct. R. 10, Canon 3(C)(5). The commentary to this Canon additionally notes that referrals may be subject to Canons 2(A), 2(B), 3(E), 4(A), and 4(D). Tenn. Sup. Ct. R. 10, Canon 3(C) cmt. In general, these Canons address impartiality (2(A)), the influence of outside relationships on judicial conduct (2(B)), disqualification (3(E)), the influence of extra-judicial activities on the office (4(A)), and the influence of financial and business dealings (4(D)).

In conclusion, trial courts have wide latitude in selecting private probation companies and, where a judge harbors a good-faith belief that one such service is superior to another, considerations of merit may result in some companies receiving more business than others. Disproportionate referrals based on simple favoritism, however, run counter to the Code of Judicial Conduct.

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