

Utah Ethics Opinions

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UTAH STATE BAR

Ethics Advisory Opinion Committee

Opinion No. 01-03

Issued March 21, 2001

¶ 1 **Issue:** What are the ethical considerations where a lawyer seeks to disqualify a judge from a case by associating a lawyer from the judge's prior private law firm and intentionally creating a circumstance in which the judge may conclude that he must recuse himself from the case?

¶ 2 **Conclusion:** Depending on the facts and circumstances, it may be unethical conduct for either lawyer to manipulate the judicial system by agreeing to associate new counsel for the primary purpose of provoking a judge's recusal.

¶ 3 **Background:** The following practice has been brought to the Committee's attention: A lawyer (the "initial counsel") is dissatisfied with the particular judge assigned to his client's case or is disappointed with one of the judge's preliminary rulings. The lawyer then associates a new lawyer (the "new colleague") on the case—a lawyer purposefully chosen from the judge's prior private law firm. Concerned that his impartiality in the case might be questioned because of the relationship with his prior law firm, the judge then recuses himself from the pending matter under Canon 3E of the Utah Code of Judicial Conduct (fn1) and the lawyer's client is assigned a new judge.

¶ 4 We have been asked to consider whether it is unethical conduct for either the initial counsel or the new colleague to remove or attempt to remove a judge from a case by intentionally creating a circumstance in which the judge will feel compelled to recuse himself under Canon 3E of the Code of Judicial Conduct. (fn2)

¶ 5 **Analysis:** There are no provisions of the Utah Rules of Professional Conduct that directly address relationships between a lawyer and a judge that could lead to the judge's disqualification. For example, the rules that define conflicts of interest—primarily Rules 1.7, 1.8, and 1.9—concern a lawyer's interests that may conflict with loyalty to a client. They do not govern relations between a lawyer and a judge that could lead to the judge's disqualification. Without more

than the mere association of a lawyer from the judge's prior law firm, we can find no *per se* ethical violation for the initial lawyer to solicit, or for the prospective new colleague to accept, an offer to associate on a case that will result in a judge's recusal.

¶ 6 The issue of the *intentional manipulation* of the judicial system by interfering with the court's assignment of a judge to hear a case is, however, more troubling. Such manipulation would constitute unethical conduct when the new colleague, who has a current or past relationship with the judge, is retained for the primary purpose of provoking a judge's recusal after the judge has issued preliminary orders or rulings or has had other substantial involvement in the litigation. A significant indicator of this improper intent would arise when the initial lawyer associates with a new colleague chosen from the court's prior private law firm, and the association has no basis in the new colleague's expertise, experience or area of practice, or the new colleague makes no significant contribution to the representation.

¶ 7 Rule 8.4(d) of the Rules of Professional Conduct establishes that, "It is professional misconduct for a lawyer to . . . [e]ngage in conduct which is prejudicial to the administration of justice." The broad language of Rule 8.4(d) is designed to reach and prohibit some activities that are not explicitly addressed in the other rules. (fn3) Notwithstanding the breadth of the language in Rule 8.4(d), the courts have generally rejected arguments that it is unconstitutionally vague. (fn4)

¶ 8 The facts presented to the Committee involve cases where the judge has invested time and resources in reviewing a case and has issued a preliminary ruling or order, following which the association of the new colleague is undertaken with the primary purpose to disqualify the judge. We conclude that this is a factual situation of the kind that Rule 8.4(d) was intended to apply to, and that the lawyers' conduct would be "prejudicial to the administration of justice."

¶ 9 The assignment and management of cases in multi-judge judicial districts is a matter that is clearly within the discretionary power and supervision of the presiding judge. A pattern of conduct that intentionally disrupts that case-assignment system—especially where there is no purpose other than to remove an unwanted judge—constitutes conduct that is "prejudicial to the administration of justice." Whether or not the manipulation of the case-assignment system would also be subject to court-imposed sanctions, we find the conduct to be unethical under the Utah Rules of Professional Conduct.

¶ 10 The conduct described also involves a lawyer's responsibility of candor toward the tribunal. (fn5) If the court were aware of the actual reason for the association with the new colleague-to recuse the judge-that knowledge could affect the judge's decision. Although the conduct here does not fall squarely within the delineated provisions of Rule 3.3, it appears to us that a lawyer who engages in this conduct is not exhibiting appropriate "candor toward the tribunal."

¶ 11 Conduct, knowingly assist or induce another to do so, or do so through the acts of another." (fn6) Thus, either the initial counsel or the new colleague in the fact situation before us may be subject to discipline for professional misconduct.

¶ 12 In rendering an opinion on this matter, we recognize that many circumstances give rise to a legitimate need to associate with new counsel or engage in other activities that might create a genuine need to recuse the judge in an ongoing proceeding. Furthermore, there are many legitimate methods by which counsel can choose a preferred forum by invoking jurisdictional thresholds and similar requirements. Such conduct, where there is a bona fide purpose and no misleading of the court, does not present ethical concerns. However, under the factual circumstances described in this opinion, the conduct would be unethical.

Footnotes

1.

(1) A judge shall enter a disqualification in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instance where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, a strong personal bias involving an issue in a case, or personal knowledge of disputed evidentiary facts concerning the proceeding; (b) the judge had served as a lawyer in the matter in controversy, had practiced law with a lawyer who had served in the matter at the time of their association or the judge or such lawyer has been a material witness concerning it...

Utah Code of Judicial Conduct, Canon 3E(1) (200)

2. This Committee, of course, has no jurisdiction to interpret the Code of Judicial Conduct and, therefore, takes no position on whether a judge in this position must recuse himself under Canon 3E(1). We assume only that recusal does result from the situation.

3. See generally Annotated Model Rules of Professional Conduct 595-97 (ABA 4th ed. 2000) and cases cited there.

4. E.g., *Howell v. Texas State Bar*, 843 F.2d 205 (5th Cir.

1988), *Comm. on Legal Ethics v. Douglas*, 370 S.E.2d 325 (W. Va. 1988).

5.

Candor toward the tribunal. (a) A lawyer shall not knowingly

(1) Make a false statement of material fact or law to a tribunal; (2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;...

(b) The duties state in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Utah Rules of Professional Conduct 3.3 (2000)

6. Utah Rules of Professional Conduct 8.4(a) (2000)

Rule Cited:

8.4(d)