

## Utah Ethics Opinions

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UTAH STATE BAR

Ethics Advisory Opinion Committee

Opinion No. 02-08

Issued September 18, 2002

¶ 1 **Issue:** An attorney filed a complaint with the Judicial Conduct Commission against a judge. The complaint was eventually dismissed for insufficient evidence with no finding of misconduct. May the attorney accept new cases as counsel and appear before that judge without advising the clients of the complaint and without giving them the option of the attorney filing a motion for recusal?

¶ 2 **Conclusion:** The attorney must inform the client if the attorney thinks the judge may harbor some ill feelings toward the attorney. However, if the attorney has a reasonable good-faith belief that the judge does not harbor any ill feeling toward the lawyer, then the lawyer need not advise the client of the complaint the lawyer filed against the judge.

¶ 3 **Background:** An attorney was the victim of a criminal act. During the pretrial process, the attorney-victim thought that the judge did not afford him his constitutional and statutory rights. He subsequently filed a personal complaint with the Utah Judicial Conduct Commission. The attorney-victim then advised new clients that were placed on this judge's docket of the unresolved personal complaint against the judge and offered to file a Rule 29 motion to recuse. In the cases that were not placed on different dockets, the judge recused himself. After processing the complaint, the Judicial Conduct Commission informed the attorney that there was insufficient evidence to warrant further proceedings. The attorney now seeks guidance on whether he may accept new cases as counsel and appear before this particular judge without advising the clients of the prior dismissed complaint and without offering to file a motion to recuse.

¶ 4 **Analysis:** Rule 1.4(b) provides "A lawyer shall explain a matter to the extent reasonably necessary to enable the client to make informed decisions regarding the representation." The commentary to Rule 1.4 further provides that "[t]he guiding principle is that the lawyer should fulfill reasonable client expectations for information

. . . consistent with the duty to act in the client's best interest and the client's overall requirements as to the character of representation." No doubt a client would like to be informed about potential ill will or even hostility between a judge and counsel and its possible effects on the client's representation. The commentary aptly provides "A lawyer may not withhold information to serve the lawyer's own interest or convenience."

¶ 5 If an actual conflict of interest exists, rather than just a potential for a conflict, Rule 1.7(b) applies: "A lawyer shall not represent a client if the representation of that client may be materially limited . . . by the lawyer's own interest, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) each client consents after consultation." A "lawyer's own interest" could include the lawyer's taking on new clients despite the potential ill feelings against him by a district court judge. The commentary to Rule 1.7 indicates a hypothetical or potential conflict does not itself preclude representation. Accordingly, if there is no actual conflict, client consent is not required.

¶ 6 The critical issues, then, are (1) the likelihood that a conflict will eventuate and, if it does, (2) whether it will materially interfere with the lawyer's professional judgment in considering alternatives or foreclose courses of actions that reasonably should be pursued.

¶ 7 A judge is also required to avoid conflicts. Canon 1 of the Code of Judicial Conduct sets the general standard that "[a] judge should participate in establishing, maintaining, and enforcing, and shall personally observe, high standards of conduct so that the integrity and independence of the judiciary will be preserved." (fn1) If a judge were to allow a dispute with an attorney on a personal level to interfere with his professional judgment, this would constitute unjudicial conduct that would prejudice public esteem of the office. Further, the judge could be subject to be "reprimanded, censured, suspended, removed from office, or involuntarily retired for . . . conduct prejudicial to the administration of justice which brings a judicial office into disrepute." (fn2)

¶ 8 At the beginning of representation, the potential conflict, if any, may never develop into an actual conflict. For instance, if a particular case is not even assigned to this judge's docket, any possible conflict will be avoided and the issue need not be addressed. Also, if the case is initially assigned to the judge, the judge might *sua sponte* recuse himself pursuant to Canon 3 of the Code of Judicial Conduct, which states, "A judge shall enter a disqualification in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where . . . the judge has a personal

bias or prejudice concerning a party or a party's lawyer."  
(fn3)

¶ 9 If the lawyer takes a case that is assigned to the judge who does not recuse himself, the lawyer must then decide if there is a reasonable, good-faith basis to believe that the judge does not harbor ill feelings or resentment toward the lawyer. The lawyer may reasonably believe the judge harbors no ill will, for example, if sufficient time has elapsed to dissipate initial ill will; if the judge has affirmatively indicated that he bears no resentment; or if the attorney has represented a client before the judge with no sign of prejudicial effect. Under such circumstances, the attorney need not inform the client of the prior incident.

¶ 10 If the lawyer believes the judge might continue to resent the lawyer's filing the complaint, the lawyer must reveal this potential conflict to the client. If the lawyer, in good faith, believes the judge does not have any ill feelings toward the lawyer, then he need not advise the client of the complaint that was filed against the judge. However, the prudent attorney will also consider that, if the client is not informed of the prior complaint, he may later find himself the subject of an ineffective-assistance-of-counsel appeal or a bar complaint, and the lawyer should be prepared to explain his reasonable good-faith conclusion that the judge did not harbor ill feelings towards him for his having filed the complaint against the judge.

#### **Footnotes**

1. Utah Code of Judicial Admin., ch. 12, Code of Judicial Conduct, Canon 1 (2002).

2. Utah Code Ann. § 78-8-103(1)(e) (1996).

3. Utah Code of Judicial Admin., ch. 12, Code of Judicial Conduct, Canon 3.E(1)(a) (2002).

#### **Rules Cited:**

**1.4(b)1.7(b)**