

Utah Ethics Opinions

1973.

11. USB EAOO Opinion No. 11

Ethics Advisory Opinion No. 11

Approved February 3, 1973

Summary: Where an actual conflict of interest exists between two defendants charged with the same crime, the Utah Legal Defenders' office may not represent both through assignment of different counsel.

If a criminal defendant would be prejudiced by representation by, a particular assigned defense counsel in the Utah Legal Defenders office because of personal conflict, another attorney in that office may represent the defendant.

Facts: You have requested an opinion on two questions, as follows

1. Assuming an actual conflict of interest between two defendants charged with the commission of the same crime, may the Legal Defenders' office undertake to represent and defend each defendant by and through the assignment of different counsel? :

2. Assuming that the defendant meritoriously argues that he will be prejudiced if defended by one member of the Legal Defender's staff, does this preclude his defense by any other member of the Legal Defenders' staff, and if so, must the court appoint outside counsel at additional expense to the county.

Opinion: Addressing ourselves to the first question, the answer would appear to be in the relationship within the Legal Defenders' office. If there were eight separate Legal Defenders, with eight separate offices, and no interrelation between or among them then no conflict of interest could or would likely arise.

As we understand the composition of the Legal Defenders' office, there is an attorney in charge of the office, who supervises the work of all of the attorneys, makes assignments on a general basis, and generally handles the administrative burdens while also carrying out his duties as one of the criminal defense attorneys.

Further, as we understand the operation of the office when an indigent defendant is assigned for defense by the court, the assignment is to the Legal Defenders office, not to a specific attorney in the office. Assignments thereafter

within the office are handled based upon prior administrative decisions or case load per attorney or a combination of these and other factors within the office.

Administrative, research and investigative staff assistance in the Legal Defenders office is available to and accessible to all staff attorneys, drawing upon the same personnel.

Files and other pertinent data are a central responsibility and are accessible to all of the staff attorneys and other personnel, and on occasions where calendar commitments require it, staff attorneys are, to some extent interchangeable.

About the only observable difference between the Legal Defenders' staff and the usual law office relationships in a partnership or office association, is the method of payment of the staff lawyers, who are actually salaried persons, and the office funding methods. Even here, the distinction becomes foggy since the advent of the professional corporation, which leaves only the method of funding the operation as the fundamental difference between the Legal Defenders' operation and the usual law office arrangement.

Opinions of the ABA are replete with the observation that attorneys engaged in the private practice of the law in a partnership or office association relationship cannot engage in the representation of persons with conflicting positions; that representation of one client in such circumstances precludes the representation of another client or other clients in such circumstances.

In Formal Opinion 128 it was said:

"In Opinions 33, 49, 50, 72 and 103, we held in substance that a partnership could not undertake any professional relationship which any one of the partners, because of adverse influences and conflicting interest, could not ethically undertake."

In Informal Opinion 995, it was held that two lawyers sharing offices, although not partners, bear such a close relation to one another as to disqualify one from representing a client if the other was disqualified.

Thus, a private attorney could not represent two criminal defendants with conflicting positions charged with the same crime, nor could any of his associates represent one of the defendants.

The fact that attorney salaries are paid from a source other than the client or clients cannot mitigate against the rights of indigent clients, to deprive them of a right that would be theirs if they were capable of meeting the financial

commitment to their attorney. Attorneys' ethics in such a situation should not turn on the necessity to reject the paying client in a private office because of the conflicting positions, while allowing attorneys under a funded program to accept such clients.

The interdiction has nothing to do with the source of payment of attorney fees or even whether attorney fees are paid at all. The interdiction deals with the fundamental principle that it is unfair and improper for an attorney to represent conflicting interests either personally or within his office where there is an appearance of impropriety.

The Legal Defenders' office is analogous to the private law office in so many respects, that we are of the opinion that such an office, and its staff, is bound by the identical ethical limitations which circumscribe the private attorney and the private law office. Consequently, we hold that the answer to the first question is that the Legal Defenders' office may not represent more than one defendant where two or more defendants to the same charge where they have conflicting interests.

Question 2 is not entirely clear. If the question posed relates to the fact situation posed in question No. 1, then the answer given to question No. 1 would be controlling and another member of the Legal Defenders' staff would be precluded from representation.

If on the other hand, the reference is independent of the question No. 1 situation, then the problem may be more factual than ethical.

If the prejudice to the defendant stems from some personal or ideological conflict between the defendant and the particular assigned defense counsel, or animus which is of a personal nature, frequently attorneys in private offices shift clients within the firm to minimize or eliminate these types of problems, and there does not appear to us to be an ethical problem involved.

If the problem stems from such matters as disclosures which would disqualify other members of a private firm, then of course, an ethical problem might exist disqualifying the entire Legal Defenders' office.

The focus should be on giving each defendant qualified and competent representation within the framework of the Code of Professional Responsibility. The court, in making assignments for the defense of indigents can make an adequate assessment of each individual case based upon the facts of that case. If there is no ethical consideration involved, certainly the court is justified in leaving the defense within the Legal Defenders' office rather than assigning private counsel.