

## Utah Ethics Opinions

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47. USB EAOB Opinion No. 47

Utah State Bar

Ethics Advisory Opinion No. 47

Approved July 28, 1978

**Summary:** An attorney must proceed with utmost care in providing limited legal services to inmates. The attorney must fully inform the inmate of the exact nature of the representation and must warn the State of Utah and its officials that they have no influence over the nature of the advice.

**Comments:** See Utah Opinion 74.

**Facts:** The Ethics Committee of the Utah State Bar has been asked to consider the propriety of providing limited legal services to inmates of the Utah State Prison under specified circumstances. This situation arose as a result of a federal court law suit, *Kelbach v. Milliken*, and the stipulated amended judgment therein. This judgment was entered into in accordance with the terms set out in the United States Supreme Court case *Bounds v. Smith*, 430 U.S. 817 (1977), regarding rights of prisoners to legal services and facilities. As a result of the *Kelbach* case, the attorney involved herein has entered into a contract with the Utah Division of Corrections to provide limited legal services to inmates at the Utah State Prison. This attorney will provide legal advice, consultation, and assistance to inmates regarding the preparation of the initial pleadings in civil matters. He will prepare, on behalf of the inmates, certain pleadings such as complaints, summons, affidavits of impecuniosity, and motions for leave to proceed in forma pauperis. These pleadings shall be prepared for the inmates, however the inmates will proceed *pro se*. The attorney will assist the inmate in the procedures necessary to file the papers and accomplish service of process. Additionally, the attorney will make a good faith effort to attempt to secure legal counsel for the inmates, through court appointment, private counsel, or legal aid agencies, or other permissible means, to pursue the legal matters on behalf of the inmates after the initial papers are filed. The attorney will not normally represent the inmate in cases that are filed, and his name shall not appear as counsel of record. The inmate will be required to sign an agreement for assistance prior to receiving advice from the attorney. This agreement will fully set forth the limited nature of the legal services to be provided. The attorney will be compensated by the State of

Utah for the services, however, he will consider the inmates to be his clients and assures this Committee that there will be no interference with the attorney-client relationship by the State of Utah. The attorney requests the Committee to comment on this arrangement.

**Opinion:** There are several questions arising under the Code of Professional Responsibility which are presented by the stated set of facts. We will first consider the ethical propriety of the attorney in question accepting employment by an inmate beyond the services rendered under the contract with the State of Utah. That is, can the attorney appear as counsel of record for an inmate after initial consultation with that inmate pursuant to the state contract? Canon 2, EC 2-4 addresses this problem as follows:

"A lawyer who volunteers in-person advice that one should obtain the services of a lawyer generally should not himself accept employment compensation, or other benefits in connection with the matter. However, it is not improper for a lawyer to volunteer such advice and render resulting legal service to close friends, relatives, former clients (in regards to matters germane to former employment), and regular clients."

Also instructional in this area are the following:

DR 2-103(A) "A lawyer shall not, except as authorized in DR 2-101(B), recommend employment as a private practitioner, of himself, his partner, or associate to a lay person who has not sought his advice regarding employment of a lawyer."

DR 2-104(A) "A lawyer who has given in-person unsolicited advice to a lay person that he should obtain counsel or take legal action shall not accept employment resulting from that advice . . . ."

While it may be argued that DR 2-104(A) is inapplicable because the advice given was not unsolicited by the inmate, still the inmate is given no choice of attorneys in that initial consultation. Therefore, it would be inappropriate and unethical for the attorney "to accept employment by an inmate other than pursuant to the terms of the contract with the state. This Committee finds, therefore, that the attorney may not accept employment by an inmate, nor may he represent an inmate beyond the terms of the state contract.

A second question raised is whether or not the services provided by the attorney, where he is the only attorney providing those services, is unethical solicitation in contravention of DR 2-103(C) or (D)(1)-(5). A similar question was raised in Informal Opinion 1313 (1975). Therein, a credit union proposed to notify its members that

it had engaged a law firm to provide the members with legal services at reasonable rates. The members would be given the name of a law firm only if they called the credit union offices. The ABA Committee found that this was not unethical so long as the program was not advertised except to give dignified and appropriate notice to credit union members. Therefore, so long as the attorney did not solicit the state directly for referral of his services to the inmates, there is nothing unethical in his providing the stated services under contract.

A third question, that of the assured independent legal judgment of the attorney, is presented in DR 2-103(D)(4)(d):

"(D) A lawyer or his partner or associate or any other lawyer affiliated with him or his firm may be recommended, employed or paid by, may cooperate with, one of the following offices or organizations that promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm if there is not interference with the exercise of independent professional judgment in behalf of his client:

(4) Any bona fide organization that recommends, furnishes or pays for legal services to its beneficiaries provided the following conditions are satisfied:

...

(d) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter."

Also pertinent is Canon 5, DR 5-107:

"(A) Except with the consent of his client after full disclosure, a lawyer shall not:

(1) Accept compensation for his legal services from one other than his client.

(2) Accept from one other than his client anything of value related to his representation of or his employment by his client.

(B) A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgments in rendering such legal services."

We are assured in the inquiry presented, that the attorney will perform services completely independent from state or other officials. However, the relationship between the attorney and the state should be fully disclosed and explained to the inmates prior to the giving of any advice. The inmate should be aware of the contract with the state

and the fact that the attorney is being paid by the state. It also must be clear that the advice given to the inmate by the attorney is free from any influence direct or indirect from officials of the state. See also, Informal Decision 679 (1953).

A fourth problem may be encountered under the provisions of Canon 4, DR 4-101, which requires an attorney to preserve the confidences of a client. We can only caution the attorney to make sure that the circumstances and physical setting utilized are such that will insure this confidentiality. The attorney's attention is directed in Informal Opinion 1188 (1971), where a question was asked regarding the propriety of releasing names and addresses of clients under the Judicare Program for a research study. The ABA Committee directed that three questions be asked: (a) Will the disclosure be embarrassing to the client; (b) Will disclosure be detrimental to the client; and (c) Did the client request nondisclosure of his name? The Committee found that if any of those questions were answered in the affirmative, the name and address could not be disclosed. Only if all answers were negative, would the attorney be free to disclose the names and addresses of Judicare clients. Similarly in this situation, the attorney must be especially careful to preserve the confidences of inmates who seek his advice. See also, Informal Opinion 1200 (1971).

Lastly, the proposed legal representation presents the question of whether or not the attorney may ethically limit his services as proposed and decline to carry through and complete the matters which are presented to him by the inmates. Canon 7, DR 7-101(A)(2) provides that "[a] lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services. . . ." The attorney in this situation is protected somewhat, because he will never become an attorney of record. However, he is aiding the inmates in possibly initiating legal action within the court system. Again, this is an area in which the situation must be fully and clearly explained to the inmate at the outset so that he will be aware of the limited services offered. Each inmate must understand that while the attorney will attempt to secure legal counsel to further pursue any matter, it may be impossible to do so, and then the inmate will have to proceed on a *pro se* basis. The inmate should be fully informed of all the pitfalls of so proceeding.

A related question involves the means which the attorney may utilize to obtain legal counsel for the inmates. This Committee has no objection to inquiries made through Public Defenders, Legal Services, Legal Aid or the Utah State Bar's referral service. We would, however, object if the attorney personally provided names of individual practicing attorneys, and thus acted as a private referral agency.

In conclusion, there is nothing inherent in the proposal that is unethical. However, the attorney is cautioned to proceed with the utmost care in performing under the contract with the State of Utah. The most important point is that the inmate be fully informed of the exact nature of the representation being offered and that the State of Utah and its officials be warned that they can and will have no influence over the nature of the advice given by the attorney to participating inmates. Also, the attorney may not provide legal services beyond those contracted for, nor may he provide names of specific attorneys for further needed legal services.

Rule Cited:

Canon 2