

Utah Ethics Opinions

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63. USB EAOC Opinion No. 63

Utah State Bar

Ethics Advisory Opinion No. 63

Approved September 21, 1979

Summary: When the attorney general's office is involved in representation of a state judge, members of the attorney general's staff should avoid appearances before that judge, or if such appearances cannot be avoided, disclosure of the concurrent legal representation of the judge should be made to the court and opposing counsel.

Facts: The Ethics Committee of the Utah State Bar has received an inquiry from the Utah Attorney General's office, concerning certain of its responsibilities. By statute, the office of the attorney general is given the responsibility of defending state officials, including judges, sued in their official capacities. Utah Code Annotated, Section 67-5-1. Such representation is provided for after proper notice, as part of the indemnification requirements of Utah law. Utah Code Annotated Section 63-48-1 et seq. The problem arises when a member of the attorney general's staff is representing state judges in legal proceedings, while members of their staff are also appearing before those same judges in various legal proceedings. Because of budgetary constraints the attorney general's office is not in a position to hire outside counsel to handle these matters.

Opinion: Informal Opinion 1331 (1975) of the American Bar Association deals with the responsibility of a private attorney in a similar situation. A law firm had been engaged by the court administrator to represent judges in various actions brought against them. This resulted because the attorney general of that state had ceased to provide such representation. The inquiry directed to the Committee was whether or not the attorneys involved could appear before the judge when they might be simultaneously representing the same judge. The Committee said that the possibility of personal liability in such suits against judges is remote, but that there existed at least an "intangible interest on the part of any judge in having his actions vindicated." The Committee noted that the number of judges available within the jurisdiction suggested the possibility of transferring cases to avoid the problem. It was further commented that no portion of the code was controlling in this situation but that the matter of disqualification of a judge in the final analysis is subject to the discretion of such judge "rather

than presenting an ethical problem for the lawyer." However, the firm involved could probably make advance arrangements through the court administrator. Canon 9 was referred to, with its direction that attorneys should avoid the appearance of impropriety. The opinion concluded that it was "preferable for your firm not to appear before a judge who is then being represented by you in these circumstances."

The fact that it is the attorney general's office rather than a private law firm involved in this situation, brings into play another portion of the code, namely Canon 8, DR R-101(A)(2), stating that "a lawyer who holds public office shall not . . . use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client." The Committee feels that the circumstances herein do not provide a viable alternative to representation of judges by attorneys other than those within the attorney general's staff. Therefore, to avoid any conceivable problems, it is suggested that the advice given in Informal Opinion 1331 be utilized and that all possible attempts be made to avoid having members of the attorney general's staff appear before a judge who is then being represented in judicial proceedings by a member of the staff. If it is impossible to transfer a case to another, uninvolved judge, then it is suggested that the attorney general lawyer involved disclose to the court and the opposition the fact of the concurrent representation of the judge. Opposing counsel then has an opportunity to object to the judge sitting on the particular matter, and the judge may then, if he chooses, disqualify himself from hearing the matter.

The Committee would like to emphasize, though be and the scope of this opinion, its belief that a judge currently represented by the attorney general's office, has a positive duty to refuse to sit in a matter where counsel includes those having a fiduciary duty to him. The Code of Judicial Conduct, Canons 1, 2, and 3(C)(2) appear to be applicable in this situation

Rule Cited:

Informal Opinion 1331