

## Utah Ethics Opinions

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Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 99

Approved October 27, 1989

**Issue:** Is an attorney who serves as a part-time county attorney or part-time deputy county attorney ethically barred from appearing as counsel on behalf of a defendant in a civil action brought by the State of Utah to collect delinquent child support payments when the State is represented by the Attorney General's Office in the same action?

**Opinion:** An attorney who serves as a part-time county attorney or part-time deputy county attorney is ethically barred from appearing as counsel on behalf of a defendant in a civil action brought in the county by the State of Utah to collect delinquent child support payments. This Opinion is limited to the disqualification required by the statutes specifically referenced in this Opinion and expresses no view on the general question of imputation of conflicts of interest under Rule 1.10.

### Analysis:

1. Conflict of Interest. Conflicts of interest are governed by Rules of Professional Conduct 1.7. Rule 1.7 prohibits a lawyer from representing a client if the representation will be adverse to another client or materially limited by responsibility to another client or by the lawyer's own interests unless (1) the lawyer reasonably believes the representation will not be adversely affected, and (2) the client consents after consultation. A county attorney is also an elected public officer subject to statutory restrictions concerning the conduct of the attorney. Two such statutory restrictions are relevant to the present issue. Utah Code Ann. § 67-16-9 states that: "No public officer or public employee shall have personal investments in any business entity which will create a substantial conflict between his private interests and his public duties."

Utah Code Ann. §67-16-4 (Supp. 1989) restricts public officers non-public employment and states:

No public officer or public employee shall . . . :

(4) accept other employment which he might expect would impair his independence of judgment in the performance of his public duties; or

(5) accept other employment which he might expect would interfere with the ethical performance of his public duties.

While the purpose of this opinion is not to address whether these statutory provisions have been violated, these provisions are relevant as to whether it would be an ethical violation for a county attorney to accept this type of private employment. The ethical standards a county attorney must meet are at least as stringent as the statutory standards.

2. County Attorneys' Duties in Collecting Delinquent Support Payments. In three different situations a county attorney has a statutory duty respecting the collection of delinquent support payments.

A. The Office of Recovery Services is given the duty to "collect child support from any obligor if the department [of Social Services] has provided public assistance, or if the department has contracted to collect support." (fn1) The duty of representing the office in such actions is placed on "the attorney general or the county attorney of any county in which a cause of action can be filed." (fn2) Under this section, then, the Office of Recovery Services seemingly can arrange for either the Attorney General or the county attorney to represent it. It is our understanding that until a few years ago almost all such cases for Recovery Services were handled by the county attorneys, but now all are handled by the Attorney General's office.

B. Under the Uniform Civil Liability for Support Act, as enacted in Utah, the Office of Recovery Services may proceed to recover support on behalf of any state agency that provides public assistance, or on behalf of the support obligee, against the support obligor. (fn3) In such actions the act places the duty of representing Recovery Services on the Attorney General or the county attorney of the county of residence of the obligee. (fn4) Here, too, the county attorney shares the statutory duty to collect support with the Attorney General, and it is seemingly the choice of Recovery Services as to which office handles the cases. It is our understanding that these cases are now also being handled by the Attorney General's office by the choice of Recovery Services. This act also places one duty exclusively on county attorneys. The county attorney's office is directed to provide assistance to an obligee desiring to proceed under this act by providing forms, informing the obligee of impecunious filing rights, advising the obligee of methods of service of process and assisting the obligee in expeditiously scheduling a hearing before the

court. (fn5)

C. Utah has also enacted the Uniform Reciprocal Enforcement of Support Act ("URES A"). (fn6) This Act is designed to facilitate interstate collection of support payments and places several duties exclusively on county attorneys. The county attorney, upon request of the court or the social services department, is to represent the petitioner in the initiation of any proceeding under the act. (fn7) If the action is initiated by a non-resident against a resident, the county attorney is to diligently prosecute the case against the resident obligor. (fn8) The duties imposed by this statute on the county attorney are not shared with any other office, and the county attorney is to handle all cases initiated under this act.

These statutory provisions impose a duty of representation upon the attorney acting in the capacity of county attorney or deputy county attorney. If the attorney were to represent a defendant in a civil action to collect child support payments, then the attorney might be unable to fulfill the attorney's statutory obligations. Thus, it would be ethically improper for the attorney to seek consent to the representation of the defendant, because the attorney could not reasonably believe the representation of the statutorily defined client would not be adversely affected. These is also a significant question as to who would be authorized to consent to such representation.

**Conclusion:** County attorneys share with the Attorney General a statutory duty to represent the Office of Recovery Services under two different statutory acts and have sole responsibility under URESA for the collection of delinquent support payments in their county. The fact that Recovery Services has arranged for the Attorney General's office to handle the case does not, in our opinion, constitute sufficient consent under Rules of Professional Responsibility 1.7 to avoid a conflict of interest in actions involving residents of the county in which the county attorney serves. The county attorney's statutory duties cannot be done away with by the consent of the Office of Recovery Services or any other state agency. The county attorney continues to have a statutory duty to represent the Office of Recovery Services and also in some instances a statutory duty to assist the obligee of the support in commencing and prosecuting an action. Any representation of a defendant in such an action involving a resident of the county in which the county attorney or deputy county attorney serves presents a conflict of interest and would not be ethically proper under Rules of Professional Responsibility 1.7 and the statutory standards placed on public officers.

#### Footnotes

1. Utah Code Ann. § 62A-11-104(1) (Supp. 1988).
2. Utah Code Ann. § 62A-11-107(4) (1988).
3. Utah Code Ann. § 78-45-9(1)(a) (Supp. 1989).
4. Utah Code Ann. § 78-45-9(1)(b) (1982).
5. Utah Code Ann. § 78-45-9.2 (1982).
6. Utah Code Ann. §§ 77-31-1 to -39 (1982).
7. Utah Code Ann. § 77-31-12 (1982).
8. Utah Code Ann. § 77-31-10 (1982).

#### Rule Cited:

1.7