

Utah Ethics Opinions

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126. USB EAOE Opinion No. 126

Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 126

Approved January 27, 1994

Issue: Under what circumstances may a city attorney represent criminal defendants?

Opinion: A city attorney with prosecutorial functions may not represent a criminal defense client in any jurisdiction. A city attorney with no prosecutorial functions, who has been appointed as city attorney pursuant to statute, may not represent a criminal defense client in that city, but may represent a criminal defense client in other jurisdictions, provided that Rule 1.7(a) of the Utah Rules of Professional Conduct is satisfied. An attorney with no prosecutorial functions, who is retained by a city on a contract or retainer basis, may represent a criminal defense client in any jurisdiction, provided that Rule 1.7(a) is satisfied. An attorney who is a partner or associate of a city attorney may not represent a criminal defense client in any situation where the city attorney is so prohibited.

Analysis: Several previous Utah ethics opinions have tackled the question of when it is appropriate for a city attorney to represent criminal defendants.¹ These opinions have been attempts by the Utah State Bar, under the previous Code of Professional Responsibility, to balance the inherent conflict between a city attorney's representation of a criminal defendant and the needs of the smaller cities in less populated areas.

This Committee has been specifically asked to reconcile the perceived contradiction between Opinion Nos. 6 and 73. In the context of that review, the Committee has determined to review all previous opinions dealing with this issue, as listed above, and to issue an opinion consolidating and revising the holdings of these previous opinions as appropriate.

TABLE 1

Opinion No. Issued Holding

6 January 13, 1972 A city attorney whose position includes prosecutions may not defend those charged with

misdemeanors and criminal offenses in other jurisdictions unless he is assigned to do so by the court

10 July 7, 1972 Municipal attorneys in sparsely populated areas of Utah may represent criminal defendants in other municipalities.

25 May 11, 1976 It is improper for members of a law firm to represent criminal defendants in municipal court where the law firm acts as a special city attorney.

41 December 22, 1977 A part-time city attorney may not represent defendants charged with violations of city ordinances, but he may represent private clients against non-city clients.

48 July 28, 1978 A Salt Lake County municipal attorney may not represent criminal defendants in other jurisdictions.

73 February 11, 1980 A municipal prosecutor may not represent criminal defendants in the same circuit court district, even if the defense is conducted in a different division of that court.

Analytic Foundation. The representation of a criminal defendant by an attorney who also represents a city creates a conflict of interest of the type identified in Utah Rules of Professional Conduct 1.7(a): "representation of [a] client [that is] *directly* adverse to another client." A criminal defendant's interests are, almost by definition, adverse to the interests of the sovereign and the political subdivisions to which the sovereign has delegated law-enforcement authority-*e.g.*, cities, towns and counties. Accordingly, Rule 1.7(a) provides the applicable standard in the analysis of city-attorney-as-defense-counsel conflict issues.²

In general, Rule 1.7 conflicts may be overcome if two conditions are met: (1) the attorney reasonably believes that the representation of each client will not be adversely affected, and (2) each client consents.³ This opinion will focus on the first of these requirements, finding that, in some situations, an attorney could not "reasonably believe" that the dual representation would not be "adversely affected." In such cases, it is irrelevant whether the clients' consent could be obtained; the representation is not permitted.

Prosecutorial Duties. Rule 1.7(a) applies most directly when an attorney attempts to represent two clients whose interests are directly adverse to each other. For example, it is clear under Rule 1.7(a)(1) that a city attorney could not represent a criminal client where there would be a direct conflict between the accused and the city attorney's public duties. The city prosecutor obviously could not represent a

client he or she is obligated to prosecute. As Justice Durham has pointed out in *State v. Brown*,⁴ the city prosecutor may be disinclined to cross-examine vigorously a police officer on whom the attorney, as a prosecutor, may rely in another matter or may be reluctant to attack the constitutionality of laws the attorney is sworn to uphold as city attorney. In addition, the defendant may be hesitant to confide fully in counsel known to be a prosecutor in the city where the defendant resides, which may compromise the quality of the representation.⁵ The city prosecutor may not, therefore, represent a criminal client charged with violation of that city's ordinances.

Even when the city attorney undertakes to represent a defendant in circumstances with no such direct conflict, there is nonetheless the potential for "adversely affecting" the attorney's relationship with one of the clients. It may be difficult to determine the various influences that could undermine the attorney's defense of the criminal client.

State v. Brown provides a general framework for analyzing the variations that are likely to arise, and it is useful to review the setting for that case. A Tremonton city attorney who had prosecutorial duties for the city was court-appointed to represent a criminal defendant in Box Elder County. Tremonton is in Box Elder County. The Utah Supreme Court found the city attorney's representation of that client to be contrary to the public interest, notwithstanding the consent of the parties and the non-identical jurisdictions (city v. county).⁶ Thus, by the court's opinion, a court-appointed city attorney with prosecutorial duties may not represent a criminal client charged within the city or an overlapping jurisdiction.⁷

It is more difficult to analyze the potential conflict when a city prosecutor represents a criminal client charged in a jurisdiction physically remote from the city that he or she represents. Yet, even in this situation, it is impossible to determine what unconscious influences may affect the representation. As the U.S. Court of Appeals for the Fourth Circuit has noted: "Each such [prosecuting] attorney may have assigned to him a particular row to hoe, but the overall objective is the cultivation of the entire field. That objective can be achieved only if each [prosecuting attorney] tends his row and does not obstruct his fellows."⁸ The Committee believes that this metaphor and the Utah Supreme Court's decision in *State v. Brown* aptly apply to remote jurisdictions, and it concludes that a city attorney with prosecutorial duties may not represent criminal defendants in any jurisdiction within Utah,⁹ including federal court.¹⁰

Nonprosecutorial duties. The attorney in *State v. Brown* was the city prosecutor. Does the outcome of the ethical analysis change if the city attorney has only civil responsibilities for the city? Yes and no, depending on the

nature of the relationship between the attorney and the city.

Statutorily Appointed City Attorneys. There is a certain perception of unity with the city's interests that attaches to a city attorney who has been appointed pursuant to statute.¹¹ Therefore, for many of the same reasons that Justice Durham discussed in *State v. Brown*, adverse representations in the same city have too great a potential for compromise of zealous representation of one or the other party—even when the city attorney limits his city representation to civil matters.

The citizens of a Utah municipality ought not to have to ask the question, "How can the estimable city attorney stand firm and foursquare for the civil interests of my city and, at the same time, defend an individual on charges of criminal activity that may be a threat to the public safety in or near my city?" The Committee believes that this is a relationship that a lawyer could not reasonably believe would not "adversely affect the relationship" with one of the clients. Accordingly, a city attorney with no prosecutorial duties may not represent criminal defendants in the same city. He may represent criminal defendants in other jurisdictions but, as with any conflict to which Rule 1.7(a) applies, only under the conditions that: (1) the attorney reasonably believes that the representation of each client will not be adversely affected,¹² and (2) each client consents after consultation.¹³

Attorneys Retained by Contract. An attorney who is not appointed as the official city attorney, but is retained on a contract basis, does not necessarily carry the presumption of unity of identity with the city's interests. The Committee is, therefore, unable to articulate a per se rule prohibiting an attorney who is hired on a contract basis, and who has no prosecutorial duties, from representing a criminal defendant client, even in the same city. This is not to say that such an attorney is free to represent criminal defendants in all circumstances. To the contrary, both elements of Rule 1.7(a) must be satisfied before any representation of a criminal defendant is undertaken by an attorney who also represents a city on some basis.¹⁴

The public policy concerns with the attorney's inherent conflict between diligent representation of his criminal defense client and the diligent representation of the city, along with the public policy concerns that clients be encouraged to discuss their cases freely with counsel, do not seem to be apparent in those instances where the criminal representation takes place in a jurisdiction other than the city that the attorney represents. In such instances, there is less likelihood that the attorney will be facing police officers and other criminal justice system participants with whom he normally works. Further, he will not be attacking ordinances he is sworn to uphold as a city attorney. The fact that the attorney, or one in his firm, is a

city attorney would not necessarily chill the criminal defense client from freely discussing his case with his counsel.

Partners and Associates. The principles set forth above apply generally to the city attorney's law-firm partners, associates or office-sharers.¹⁵ In particular, the city attorney's partners, associates or those with whom the city attorney practices in situations that could be construed as a "firm" cannot represent criminal defendants in any situation where the city attorney would be so prohibited.

Conclusion. A city attorney with prosecutorial functions may not represent a criminal defense client in any jurisdiction. A city attorney with no prosecutorial functions, who has been appointed as city attorney pursuant to statute, may not represent a criminal defense client in that city, but may represent a criminal defense client in other jurisdictions, provided that Rule 1.7(a) of the Utah Rules of Professional Conduct is satisfied. An attorney with no prosecutorial functions, who is retained by a city on a contract or retainer basis, may represent a criminal defense client in any jurisdiction, provided that Rule 1.7(a) is satisfied. An attorney who is a partner or associate of a city attorney may not represent a criminal defense client in any situation where the city attorney is so prohibited.

All of the situations in which the city attorney might represent a criminal defendant are, of course, subject to the underlying provisions of Rule 1.7(a), including the required consent under subparagraph (2).

To the extent that the conclusions reached in this Opinion are inconsistent with previous Opinion Nos. 6, 10, 25, 41, 48 and 73, those opinions are deemed modified or overruled.

Footnotes

1. Utah Code Ann. § 17-18-1(9)(a) (1991) directly disposes of this issue for county attorneys: "A county attorney may not: (a) in any manner consult, advise, counsel, or defend within this state any person charged with any crime, misdemeanor, or breach of any penal statute or ordinance."

2. Rule 1.7(c) seems to address a similar relationship, when there are "interests of adverse parties in separate matters," with the same proscriptions and conditions as found in Rule 1.7(a). This provision is not found in the Model Rules of Professional Conduct, and there is no explicit reference to paragraph (c) in the official comments to Rule 1.7. Because this Opinion reaches its conclusion by applying Rule 1.7(a) to the issue at hand, it is unnecessary to decide what, if any, situations are contemplated by Rule 1.7(c) that wouldn't already be included under Rule 1.7(a).

3. A lawyer shall not represent a client if the representation

of that client will be directly adverse to another client, unless:

(1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) Each client consent after consultation.

Utah Rules of Professional Conduct 1.7(a).

4. 853 P.2d 851, 857 (Utah 1992).

5. *Id.* at 858.

6. *See also People v. Rhodes*, 524 P.2d 363, 366 (Cal. 1974) ("Neighboring and overlapping law enforcement agencies have close working relationships, and resentment engendered by a city attorney within the membership of such agencies would have an adverse effect on the relationship of the city attorney with members of his local police department.")

7. In the judgment of the Committee, the Utah Supreme Court's analysis did not in any way depend on the fact that the attorney had been court-appointed to serve as defense counsel. On the contrary, if there is a conflict when a judicial officer orders the representation, a fortiori, the same conflict would exist if the dual representation is not court-ordered.

8. *Goodson v. Peyton*, 351 F.2d 905, 908 (4th Cir. 1965).

9. Utah Code Ann. § 17-18-1(9)(a) (1991) similarly proscribes such representation "within this state" by county attorneys. Note 1, *supra*.

10. *See* ABA Standard 4-3.5(g), Defense Function; ABA Standard 3-1.3(b), Prosecution Function.

11. Utah Code Ann. §§ 10-3-901 & -902 (1992).

12. There may be particular circumstances where the representation of a criminal client would be sufficiently adverse to the attorney's city client as to make it impossible to satisfy subparagraph (1) of Rule 1.7(a). This would be a matter for the affected attorney to evaluate on the particular facts. The Committee cannot foresee all possible circumstances where the lawyer could not reasonably decide there were not adverse effects, and it declines to provide definitive safe harbors or out-of-bounds rulings on Rule 1.7(a) that are fact-dependent.

13. This Opinion offers no guidance on who may give such consent on behalf of the city client or the appropriate procedure by which to obtain such consent.

14. The Committee reiterates its reluctance to describe all

situations in which representation would or would not be appropriate. As a general guideline, however, the Committee believes that the closer the interests of the attorney and the city are perceived to be, the more difficult it will be for the attorney to make the determination that neither client's interests will be adversely affected.

15. "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c) or 2.2." Rules of Professional Responsibility 1.10(a). *See also* Comment to Rule 1.10, addressing the definition of a "firm."

Rule Cited:

1.7