

Utah Ethics Opinions

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Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 145

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Issues: May a law firm accept a court appointment to represent an indigent defendant in a re-trial of a criminal case in which an investigator who had been involved in the State's investigation of the defendant and testified against the defendant at the first trial is now a full-time employee of the law firm? (fn1)

May a law firm represent other defendants in matters in which the investigator personally and substantially participated while employed with the State but in which the investigator will not be called as a State witness?

Opinion: A law firm must avoid representing a defendant in a case in which its investigator may be called as a State witness. In addition, in matters in which the investigator will not be a State witness, the law firm must screen the investigator from participation in any matter in which the investigator had substantial, personal involvement for the State.

Analysis: These issues require consideration of two fundamental principles of the client-lawyer relationship. The first is the duty of loyalty to the client. The second is the obligation to preserve a client's secrets and confidences. The first of these principles prohibits a law firm from representing the defendant in the re-trial. The second requires the implementation of a procedure to screen the investigator from participation in matters related to his work for the State.

A. Lawyer's Duty of Loyalty to the Client.

Rule 1.7 of the Utah Rules of Professional Conduct protects clients from conflicts between the lawyer's loyalty to the client and the lawyer's loyalty to others or the lawyer's own self-interest. Specifically, it prohibits a lawyer from representing a client where "the representation of that client may be materially limited by the lawyer's responsibilities . . . to a third person or by the lawyer's own interest." A lawyer's loyalty is impermissibly impaired when the lawyer's conflicting loyalties prevent the lawyer

from considering, recommending or implementing an appropriate course of action for the client or when the conflict forecloses alternatives that would otherwise be available to the client. (fn2) In particular, a conflict exists where the lawyer's interest in a witness impairs or limits the lawyer's ability effectively to challenge the credibility of the witness. (fn3)

Rule 1.7 precludes a law firm from representing the defendant so long as the possibility exists that an investigator employed by the law firm will testify. In such a situation, the lawyer's representation of the client may be materially limited by risk of harm to the office or the investigator from the impeachment the office's own employee. Such impeachment could potentially reduce or eliminate the investigator's effectiveness as an employee of the law firm. In addition, a substantial possibility would exist that the State might try to use the investigator's current employment with the law firm to enhance the investigator's credibility in a manner that the law firm could not effectively rebut without injury or embarrassment to the office or its employee. The law firm's conflicting loyalties to the defendant, its employee and to itself prevent it from representing the defendant under Rule 1.7. (fn4)

Rule 1.7 is not the only basis for disqualification. In *State v. Brown*, (fn5) the Utah Supreme Court unambiguously described the conflict that arises when a lawyer's interests limit the ability to cross-examine a witness:

In the situation confronting a city attorney acting as a defense counsel there inevitably will arise a struggle between, on the one hand, counsel's obligation to represent his client to the best of his ability and, on the other hand, a public prosecutor's natural inclination not to anger the very individuals whose assistance he relies upon in carrying out his prosecutorial responsibilities. Such a conflict of interest would operate to deprive a criminal defendant of the undivided loyalty of defense counsel to which he is entitled. (fn6)

In part, because of this conflict, the court adopted a *per se* rule prohibiting part-time prosecutors from accepting appointments to represent indigent defendants. Although the *Brown* decision did not turn on the application of the Rules of Professional Conduct and involved additional conflicts not at issue here, the decision provides clear direction in evaluating conflicts. (fn7)

In some situations, a client may, after consultation, consent to a Rule 1.7 conflict if the lawyer reasonably believes that the representation will not be adversely affected. However, "when a disinterested lawyer would conclude that the client should not agree to the representation under the

circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the consent." (fn8) Ordinarily, the lawyer is primarily responsible for determining when conflicting loyalties may materially limit the lawyer's representation of the client. (fn9) However, in this case, the substantial conflict involving a criminal defendant and an adverse witness employed by the lawyer makes it unlikely that a reasonable, disinterested lawyer would conclude that the client should consent to the representation. (fn10)

B. Duty to Maintain Confidences.

Although the duty of loyalty bars representation of the defendant in the re-trial, this duty does not bar the law firm from representing other defendants in matters related to the investigator's work for the State, so long as the investigator will not be a State witness. Such a representation is appropriate if the law firm properly implements a screening procedure that insures that any confidences obtained by the investigator as a State employee are not disclosed.

A fundamental aspect of the client-lawyer relationship is the lawyer's duty to maintain the client's confidences relating to the representation of the client. (fn11) To further this goal, Rules of Professional Conduct 1.7 and 1.9 limit situations in which lawyers or their law firms may represent clients with interests adverse to the lawyer's clients or former clients. Rules 1.10 and 1.11 also limit situations in which law firms may represent clients who are adverse to former clients of a recently hired lawyer or the new lawyer's prior law firm. The primary goal of these rules is to insure that information obtained by the lawyer in representing the client is not later used against the client on behalf of another client. (fn12)

Although these rules on maintaining client confidences do not expressly apply to non-lawyers such as the investigator in this case, the importance of maintaining confidences has led courts and state ethics committees to apply similar restrictions on non-lawyers moving between law firms who represent adverse clients. (fn13) The application of these rules to non-lawyers is in part mandated by Rule 5.3, which requires that a lawyer insure that the lawyer's non-lawyer staff complies with the rules as well as by the lawyer's duty to avoid participating with others in violating a client's confidences. (fn14)

Rule 1.11 contains the ethical restrictions on a law firm that hires a lawyer who has been employed by the government. Under this rule, a law firm may not represent a client in a matter in which the lawyer had a substantial and material participation in the government's representation unless (a) the lawyer is screened from any participation in the matter, (b) the lawyer is given no portion of the fee and (c) the firm gives the appropriate government agency prompt notice to

enable the agency to insure compliance with the rule's screening requirements. Similar restrictions apply to firms whose members include lawyers who have had access to confidential governmental information.

Rule 1.11 applies in this case to the extent that the investigator had substantial, personal involvement in the representation of the State in matters where the law firm is adverse. This participation, however, would not preclude a law firm from representing the defendant if it notified the appropriate government agency and timely screened the investigator from all participation in the defense. (fn15)

Whether a law firm could construct an effective screening procedure is a fact-specific question, and this Opinion will not attempt an exhaustive discussion of what methods would be adequate. A few observations however may be helpful to the Bar, however.

Critical to construction of an effective screening procedure is timing. The screening procedure must be in place at the time the conflict arises, which in this case is when the investigator begins employment. In addition, the construction of a "Chinese wall" requires a careful attention to detail. For example, the Michigan Standing Committee on Professional and Judicial Ethics has described what should be included in any screening procedure:

The new employee must not actively work on the file In fact, the files should be physically segregated from the employee to avoid both intentional and inadvertent access to them by the employee. The employee should be instructed not to access these files or discuss the files or any related matters with other members of the firm. In addition, other employees of the firm should be instructed: (1) not to discuss these files or related matters in the employee's presence; (2) not to allow the employee to review related documents or materials; and (3) not to receive any information from the employee regarding these files. (fn16)

If the law firm implements an appropriate screening program, its employment of the investigator should not create an ethical dilemma in cases where the investigator will not be called as a witness for the State.

Conclusion: To avoid violating the Rules of Professional Conduct, a law firm must not represent defendants in cases in which the investigator may be called as a State witness. In addition, in matters in which the investigator will not be a State witness, the law firm must screen the investigator from participation in any matter in which the investigator had substantial, personal involvement for the State.

Footnotes

1. The question was originally posed to the Committee in the context of a criminal defense firm funded by outside

private and public entities. The analysis of this Opinion applies equally well to any law firm (or sole practitioner, for that matter).

2. Utah Rules of Professional Conduct 1.7 cmt.

3. Rule 3.7(b) permits a lawyer to act as an advocate in a matter where a member of the lawyer's firm will be a witness, unless Rule 1.7 bars such a representation. Rule 1.7 would bar the representation where a substantial conflict exists between the witness's testimony and the client's position. Rule 3.7 cmt.

4. The conflict of interest here exists regardless of the stage of the proceeding. For example, the lawyer's advice concerning a plea arrangement may be materially limited by the possibility of the investigator's testimony. The conflict would, however, be eliminated if the prosecutors unequivocally stated their intent not to call the investigator as a witness.

5. 853 P.2d 851 (Utah 1992).

6. *Id.* at 857-58. In *State v. Holland*, No. 910352, 1994 WL 9186 at *2 (Utah Jan. 13, 1994), the Utah Supreme Court held:

If an attorney's loyalty is compromised because he believes that his client should be convicted or because he is influenced by a conflict in loyalties to other defendants, third parties, or the government, the law cannot tolerate the risk that the attorney will fail to subject the prosecution's case to the kind of adversarial challenge necessary to ensure that the accused receives the effective assistance of counsel guaranteed by the Sixth Amendment.

7. *See Brown*, 853 P.2d at 856-57 (basing the decision on "vital interests of the criminal justice system"); *id.* at 857 n.4 (noting that the Rules of Professional Conduct did not govern the decision).

8. Rule 1.7 cmt.

9. *Id.*

10. The Utah Rules of Professional Conduct, Terminology, include the following definitions:

"Reasonable" or "reasonably," when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer.

"Reasonable belief" or "reasonably believes," when used in reference to a lawyer, denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

11. Rule 1.6 cmt.

12. Rule 1.9 cmt.

13. *See generally In re Complex Asbestos Litigation*, 283 Cal. Rptr. 732 (Cal. App. 1991); *Temkin v. Temkin*, No. 057629, 1993 WL 392941 (Conn. Super. Ct. Sept. 28, 1993); Mich. Comm. on Professional and Judicial Ethics, Op. No. RI-115 (Jan. 31, 1992), ABA/BNA Lawyers Manual on Professional Conduct 1001:4760; N.J. Sup. Ct. Adv. Comm. on Professional Ethics, Op. No. 665 (Aug. 3, 1992), ABA/BNA Lawyers Manual on Professional Conduct 1001:5804.

14. Mich. Ethics Op. No. RI-115, *supra* note 13.

15. The Rules of Professional Conduct expressly authorize the use of screening procedures or "Chinese walls" to protect the former client's confidences only where the attorney is moving from government employment to private employment. Rule 1.10, governing disqualification where the lawyer is moving between private firms, does not expressly authorize the use of screening procedures to insulate the tainted lawyer from other firm members who are representing a person adverse to the lawyer's former client. *See generally SLC Limited V v. Bradford Group West, Inc.*, 999 F.2d 464, 469 (10th Cir. 1993).

16. Mich. Ethics Op. No. RI-115, *supra* note 13.

Rule Cited:

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