

Utah Ethics Opinions

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Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 95-07

Approved September 22, 1995

Issue: After the Utah Attorney General has represented a division of a state agency in an action the division has brought before a state disciplinary board and the division has adopted the recommendation of that board, may the Attorney General file and pursue an appeal in her own name or on behalf of the public at large to the head of the agency of which the division is a part?

Conclusion: Where no conflict with other constitutional or statutory provisions exists, the Attorney General retains common-law authority to protect what she perceives to be the public interest. Under the facts outlined below, the Attorney General may appeal the decision of a division of a state agency to the executive director of that agency, without violating the Utah Rules of Professional Conduct.

Facts: Within a state administrative agency created by Utah statute (the Agency), there is a division that is responsible for the regulation of certain licensed professionals (the Division). Also as a part of the administrative agency, there is a state board (the Board) that conducts evidentiary hearings and renders recommendations to the Division affecting the rights of individuals whose professions are regulated by the Division. The Board's recommendations may be affirmed, modified or rejected by the director of the Division within the Agency. The director's decision constitutes the Division's final order. The Division's final order, in turn, may be appealed by the affected individual or other interested parties to the Agency's executive director.

In this case, the Utah Attorney General represents and provides legal counsel to the Division. Her representation includes instituting proceedings before the Board on behalf of the Division.

In response to complaints filed with it, the Division instituted proceedings before the Board, seeking severe sanctions against an individual. The Division was represented at all times before the Board by an Assistant Attorney General. The Board ultimately recommended sanctions much less harsh than those sought by the

Division. The Division director, however, adopted the Board's recommendation as the Division's final order. The Attorney General, in her own name and purportedly "on behalf of the public," subsequently appealed the Division's final order to the Agency's executive director.

On appeal, an attorney employed by the Agency represented the Division. The Division's attorney on appeal was not an employee of the Office of the Utah Attorney General.

Analysis: The Attorney General's authority to act derives from three sources. The Utah Constitution declares that "The Attorney General shall be the legal advisor of State officers . . ." (fn1) The Attorney General, therefore, enjoys constitutional authority to represent executive officers identified by Art. VII. (fn2)

Section 16 of Article VII also declares that the Attorney General "shall perform such other duties as provided by the law." Accordingly, the Legislature has conferred broad authority upon the Attorney General to act as the State's chief legal officer:

The Attorney General shall: (1) . . . prosecute or defend all causes to which the state, or any officer, board, or commission of the state in an official capacity is a party; and take charge, as attorney, of all civil legal matters in which the state is interested. (fn3)

Finally, to the extent that it does not conflict with her constitutional and statutory rights and obligations, the Utah Attorney General retains powers recognized in the common law. (fn4) The Attorney General's common law authority includes filing actions she perceives as advancing the public interest. (fn5)

In private practice, the client typically defines the objectives of representation. (fn6) The Utah Rules of Professional Conduct prohibit a private attorney from representing a client whose interests or objectives conflict with those of either the attorney's current or former clients, unless the attorney strictly adheres to certain additional requirements. (fn7) These conflict-of-interest provisions certainly may also control the Attorney General's conduct. (fn8)

A government attorney compelled by law to service different masters with varied interests, however, is likely to encounter conflicts of interest regularly. (fn9) The Utah Rules of Professional Conduct, in the prefatory section titled *Scope*, acknowledge these phenomena:

Under various legal provisions, including constitutional,

statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. . . . [Government lawyers] also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These Rules do not abrogate any such authority. (fn10)

Which master should the Attorney General obey when the division renders a decision the Attorney General believes contravenes the public interest? The decision rests largely within the Attorney General's discretion where, as here, she is vested with common-law authority. In *Feeney v. Commonwealth*, (fn11) the question posed above was certified to the Massachusetts high court by the United States Supreme Court. Initially, a state administrator and agency were named defendants in a suit challenging a statute's constitutionality. The attorney general represented the defendants. The lower court ruled against the defendants. The defendants directed the attorney general to forego an appeal. The attorney general, against his client's direction, appealed to the United States Supreme Court. (fn12)

Massachusetts, like Utah, grants its attorney general the authority to supervise all legal proceedings in which the state is interested. Similarly, the Massachusetts attorney general retains common law authority to represent the public interest. (fn13) The court in *Feeney* found that the attorney general is not merely an advocate for state agencies and officers. Rather, he is responsible for formulating the Commonwealth's legal policy. The court also found that the attorney general "is not constrained by the parameters of the traditional attorney-client relationship." (fn14) The court held:

Where, in his judgment, an appeal would further the interests of the Commonwealth and the public he represents, the Attorney General may prosecute an appeal to the Supreme Court of the United States from a judgment of the District Court over the expressed objections of the State officers he represents. (fn15)

While they involve issues not specifically raised or addressed by this opinion, numerous courts from other states have reached similar conclusions regarding the government attorney's role. For example, the Alabama Supreme Court expressly addressed a claim that a government attorney had engaged in an unethical conflict of interest. (fn16) There, the court ultimately concluded that the attorney general was authorized by state and common law to seek dismissal of a state agency's appeal of an unfavorable lower court ruling. The court reviewed numerous cases from other states addressing similar or analogous issues and concluded that the majority rule holds

that an attorney general may intervene on behalf of the public interest in matters where he has no personal interest, even where such intervention runs counter to the direction of the client agencies. (fn17)

Factors may exist that would affect the Utah Attorney General's ability to challenge the final order of her client, the Division, without violating the Utah Rules of Professional Conduct. For example, the Attorney General may have gained confidential information in the course of her representation of or association with the Division that she is now in a position to reveal through her appeal of the Division's order. Likewise, her challenge to the Division's final order might irreparably harm the attorney-client relationship existing pursuant to law between the Division and the Attorney General. (fn18) Because the request giving rise to this opinion omits mention of any such factors, they will not be addressed further.

Summary: Given the facts set forth above, the Utah Attorney General may appeal the final decision of the Division to the parent agency's executive director without violating the Utah Rules of Professional Conduct.

Footnotes

1. UTAH CONST. art. VII, § 16.

2. *Hansen v. Utah State Retirement Board*, 652 P.2d 1332, 1336-37 (Utah 1982).

3. Utah Code Ann. § 67-5-1 (Supp. 1995). *See also* Utah Code Ann. § 67-5-3 (1993) (the Attorney General may render legal assistance to any state agency, division, board, etc.); Utah Code Ann. § 67-5-5 (1993) (absent constitutional or statutory authority, no agency shall hire outside counsel).

4. Utah Code Ann. § 68-3-1 (1993). *E.g.*, *State v. Robertson*, 886 P.2d 85, 89-90 (Utah App. 1994); *Hansen*, 652 P.2d at 1337-38.

5. *E.g.*, *Robertson*, 886 P.2d at 90, citing and quoting *State v. Finch*, 280 P. 910 (Kan. 1929); *Hanson v. Barlow*, 456 P.2d 177, 178-80 (Utah 1969).

6. Utah Rules of Professional Conduct 1.2(a).

7. *Id.* Rules 1.7, 1.9.

8. *E.g.*, *Manchin v. Browning*, 296 S.E.2d 909 (W. Va. 1982); *People v. Brown*, 624 P.2d 1206 (Cal. 1981); see Charles W. Wolfram, *Modern Legal Ethics* § 8.9.1, at 448-49 (1986).

9. *See* Wolfram § 8.9.2, at 449-51 (government attorney roles may include advisor, advocate and policy maker; her

clients may include entities, officers and the general public).

10. *See also* A.B.A. Model Rules of Professional Conduct, Scope (1991).

11. 366 N.E.2d 1262 (Mass. 1977).

12. *Id.* at 1263-64.

13. *Id.* at 1265-66.

14. *Id.* at 1266.

15. *Id.* at 1267.

16. *Ex parte* Weaver, 570 So. 2d 675 (Ala. 1990).

17. *Id.* at 680-84, generally citing and discussing: *Feeney v. Commonwealth*, 366 N.E.2d 1262 (Mass. 1977); *Connecticut Comm'n on Special Revenue v. Connecticut Freedom of Information Comm'n*, 387 A.2d 533 (Conn. 1978); *Allain v. Mississippi P.S.C.*, 418 So. 2d 779 (Miss. 1982); *Martin v. Thornburg*, 359 S.E.2d 472 (N.C. 1987); P.U.C. of *Texas v. Cofer*, 754 S.W.2d 121 (Tex. 1988).

18. *See, e.g.*, Utah Rules of Professional Conduct 1.7, 1.9(b), 1.11; *State v. Klattenhoff*, 801 P.2d 548, 552 (Haw. 1990); *People v. Brown*, 624 P.2d 1206 (Cal. 1981).

Rule Cited: