

Utah Ethics Opinions

1998.

98-04. USB EAOC Opinion No. 98-04

Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 98-04

Approved April 17, 1998

Issue: May a private practitioner who has been appointed as special deputy county attorney to investigate and prosecute a single matter continue to represent criminal defendants in any jurisdiction in Utah?

Opinion: No. Even assuming such conduct is permitted by Utah statute, Rule 1.7(a) of the Utah Rules of Professional Conduct and the reasoning of Utah Ethics Opinion No. 126 prevent a special deputy county attorney from representing criminal defense clients in any jurisdiction in the State. In addition, Rule 1.10 prohibits any member of the special deputy's law firm from representing criminal defendants in any jurisdiction in the State during the period of the appointment.

Analysis: A county attorney proposes to appoint a special deputy county attorney. The appointment would authorize the special deputy "to investigate and take whatever action, if any, you deem appropriate" regarding alleged misconduct by certain public officials. We have been asked whether the attorney appointed as special deputy or his law firm may continue to represent criminal defendants during the tenure of the special deputy's appointment.

Before we turn to the Utah Rules of Professional Conduct, we note that Utah statutes directly prohibit a county attorney from representing criminal defendants in any jurisdiction within the state. (fn1) Although the elected county attorney is authorized by statute to appoint deputies as necessary to fulfill the requirements of the position, (fn2) these statutes do not provide that deputies or special deputies are exempt from the prohibition against representing criminal defendants under §§ 17-18-1(9) and 17-18-1.5(7)(a). Indeed, we think it unlikely that this prohibition could be circumvented merely by the appointment of deputies or special deputies. Therefore, we believe that §§ 17-18-1(9) and 17-18-1.5(7)(a) directly control and prohibit the specially appointed deputy from representing criminal defendants any place in Utah. (fn3) Utah Rule of Professional Conduct 1.10 then imposes the

same restriction on other members of his firm.

However, even if the Utah statutes could be construed or were changed to allow a special deputy appointed to prosecute a particular matter to continue to represent criminal defendants, such conduct would violate the Utah Rules of Professional Conduct.

In Opinion No. 126, (fn4) we concluded that:

A city prosecutor may not represent a criminal defense client in any jurisdiction.

A city attorney with no prosecutorial functions who has been appointed pursuant to statute may represent criminal defendants in any jurisdiction but that city.

A city attorney with no prosecutorial functions who is retained on a contract basis may represent criminal clients in any jurisdiction, provided Rule 1.7(a) is satisfied.

An attorney who is a partner or associate of a city attorney is bound by the same proscriptions as the city attorney.

We based this opinion on Rule 1.7(a), which generally prohibits an attorney from representing directly adverse clients, and found that "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."

Rule 1.7(a) provides an opportunity for a client to consent to an otherwise conflicted representation, but only if the attorney could "reasonably believe" that the dual representation would not be "adversely affected." As we noted in Opinion No. 126, no attorney could reasonably believe she could represent a defendant charged with violation of the city's ordinances, when the attorney is also that city's prosecutor.

Opinion No. 126 goes even further, however, and finds that the city attorney cannot reasonably believe she could represent criminal defendants in any jurisdiction in Utah. Adopting the reasoning of the Utah Supreme Court in *State v. Brown* (fn5) and the U.S. Court of Appeals for the Fourth Circuit in *Goodson v. Peyton*, (fn6) we found that a city prosecutor's representation of a criminal defendant may be obstructed by unconscious influences, and that those who undertake to represent the sovereign in criminal matters should not represent criminal defendants in any jurisdiction within the state.

Although the special deputy would be acting as a county prosecutor and not as city prosecutor, the reasoning of Opinion No. 126 applies. The special deputy may not

represent any criminal defendants in any jurisdiction in Utah while he is also acting as a special prosecutor for a county.

Opinion No. 126 does offer an exception for some city attorneys who are appointed and not elected pursuant to statute, reasoning that appointed or contracted attorneys are less likely than the elected city attorney to be associated with the interests of the city. The exception in Opinion No. 126 for appointed city attorneys is, however, limited to those who have *no prosecutorial duties*. In the case before us, the special attorney's appointment contemplates that he will file criminal charges if warranted by the investigation. Thus, he has been appointed as a special prosecutor, albeit focused on certain individuals and certain conduct, and cannot make use of this exception.

Finally, Rule 1.10(a) prevents any member of the special deputy's firm from representing criminal defendants in any jurisdiction within the State, since the special deputy himself is so prohibited.

Footnotes

1. Utah Code Ann. §§ 17-18-1(9)(a), 17-18-1.5(7)(a); *see also* § 17-18-1.7(6)(c) (1995).

2. Utah Code Ann. § 17-16-7 (1995).

3. The Committee does not render legal opinions, but it has the authority to cite applicable case law and statutes "as necessary to the opinion." Utah Ethics Adv. Op. Comm. Rules of Proc. § IV(a); *see also id.* § III(c)(2).

4. Utah Ethics Advisory Op. No. 126, 1994 WL 579846.

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

6. 351 F.2d 905 (4th Cir. 1965).

Rule Cited:

1.10