

Utah Ethics Opinions

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Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 98-06

Approved October 30, 1998

Issue: Members of a county attorney's office have requested an advisory opinion concerning conflicts between (1) attorney-client relationships between a county attorney and county officers and (2) statutory duties of a county attorney under Utah Code Ann. § 17-5-206 to institute suits to recover or restrain unlawful payments of county funds.

Opinion: If a current attorney-client relationship exists between a county attorney or a deputy county attorney and a person who may be a defendant in an action under Utah Code Ann. § 17-5-206 to recover or restrain unlawful payments of county funds, the attorney with such an attorney-client relationship may not ethically participate in such an action, whether by way of investigation, evaluation, filing, prosecution, direction, supervision, or otherwise. (fn1) The rules of imputed disqualification of Utah Rules of Professional Conduct 1.10 do not apply to the office of a full-time county attorney, so that individual county attorneys or deputy county attorneys who are free from conflicts in the matter may participate in actions under § 17-5-206, provided that appropriate screening procedures are established and maintained. Past representations by individual members of a county attorney's office must be evaluated for conflicts under the provisions of Rule 1.9.

Analysis:A. Introduction. In Utah, a county attorney is an officer of the county elected to a four-year term of office. (fn2) The county attorney must be an attorney duly licensed to practice law in Utah who is an active member in good standing of the Utah State Bar. (fn3) By statute, "[t]he county attorney is the legal adviser of the county." (fn4) Among other duties, the county attorney must defend all actions brought against the county and must give, when required and without fee, an opinion in writing to the county, district, precinct, and prosecution district officers on matters relating to the duties of their respective offices. (fn5)

Lawyers in a Utah county attorney's office may include both the elected county attorney and unelected deputy

county attorneys. (fn6) By Utah statute, whenever the official name of any principal officer of a county is used in law conferring powers or imposing duties or liabilities, it includes deputies. (fn7)

County attorneys in Utah have a statutory duty to institute suits in the name of the county to recover or restrain unlawful payments of county funds. Utah Code Ann. § 17-5-206 provides:

Whenever any county legislative body shall without authorization of law order any money paid for any purpose and such money shall have been actually paid, or whenever any other county officer has drawn any warrant in his own favor or in favor of any other person without being authorized thereto by the county legislative body or by law and the same shall have been paid, the county attorney of such county shall institute suit in the name of the county against such person or such officer and his official bondsman to recover the money so paid, and when the money has not been paid on such order or warrants, the county attorney of such county upon receiving notice shall commence suit in the name of the county to restrain the payment of the same; no order of the county legislative body shall be necessary in order to maintain either of such actions.

When this statute applies, the county attorney or deputy county attorney involved may face a conflict if there is a current or past attorney-client relationship with the defendant. (fn8)

B. Application of Rule 1.10. Like other government attorneys, individual county attorneys and deputy county attorneys are subject to the Utah Rules of Professional Conduct. There are some situations where certain government lawyers are accorded somewhat different treatment in light of the constitutional or statutory context in which they operate. For example, this Committee has previously determined that the imputed conflict rules of Rule 1.10 of the Rules of Professional Conduct do not apply to the office of the Utah Attorney General in the same way they apply to attorneys in private firms. (fn9) Opinion No. 142 determined, as to the office of the Utah Attorney General, that the conflict-of-interest rules of Rule 1.10 apply only on an attorney-specific basis and that conflicts of one attorney in the Attorney General's office should not be imputed to all attorneys in that office. Opinion No. 142 also determined that conflicts rules must be fully satisfied on an individual basis and that the Utah Attorney General must ensure that attorneys with conflict problems are removed and screened from the particular representation at issue.

Although the role, powers, and duties of county attorneys in Utah are significantly different from those of the Utah Attorney General, we believe that, for purposes of imputed disqualification under Rule 1.10, the office of a full-time county attorney should be analyzed in the same way as the office of the Utah Attorney General. (fn10) Across-the-board application of imputed disqualification rules to a full-time county attorney's office would frustrate the fulfillment of the county attorney's statutory duties and could require, at significant cost, excessive requirements for employment of private counsel. Accordingly, we conclude that, notwithstanding the usual imputation of conflicts of interest to all attorneys in a private firm under Rule 1.10, this strict imputation does not apply to the office of a full-time county attorney.

We also conclude, however, that the generally applicable conflicts rules of the Rules of Professional Conduct apply to each county attorney and deputy county attorney on an attorney-by-attorney basis. These rules include Rule 1.7 (Conflict of Interest: General Rule), Rule 1.8 (Conflict of Interest: Prohibited Transactions), Rule 1.9 (Conflict of Interest: Former Client); Rule 1.11 (Successive Government and Private Employment), Rule 1.12 (Former Judge or Arbitrator), and Rule 1.13 (Organization as a Client). A county attorney or deputy county attorney who cannot individually satisfy the requirements of these rules should not engage in, supervise, direct, or have access to confidential information pertaining to the representation in question. Moreover, county attorneys must adopt procedures to ensure that individual lawyers with conflict problems are sufficiently removed and screened from those matters so as not to compromise client confidences or any other purposes related to the representation as promoted by the Utah Rules of Professional Conduct.

C. Application of Rule 1.13. Consideration of Rule 1.13 (Organization as a Client) does not change this analysis. The duties defined by Rule 1.13 apply to government lawyers, except to the extent the responsibilities of government lawyers are otherwise controlled by the duties imposed upon them by law. (fn11) Rule 1.13(b) provides an ethically sound method for a county attorney to deal with actions of county officers, county employees, or other persons associated with the county in violation of a legal obligation to the county:

If, in a matter related to the representation of an organization, a lawyer knows that an officer, employee or other person associated with the organization is engaged in, intends to engage in, or refuses to take action in violation of a legal obligation to the organization or that may reasonably be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer

shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization, except as required by law or other rules of professional conduct. Such measures may include among others: (1) asking reconsideration of the matter; (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

For example, in county matters governed by Utah Code Ann. § 17-5-206, Rule 1.13(b) imposes an ethical duty on county attorneys and deputy county attorneys not only to proceed in the best interests of the county but also to proceed only after giving due consideration to the seriousness of the violation and its consequences, the scope and nature of the attorney's representation of the county, the responsibility of the county, the apparent motivation of the person involved, the policies of the county concerning such matters, and any other relevant consideration. We emphasize that Rule 1.13(b) also imposes an ethical duty on county attorneys and deputy county attorneys to assure that measures taken are designed to minimize disruption of the county organization and the risk of revealing information relating to the representation of the county to persons outside the county organization, except as required by law or other Rules of Professional Conduct.

Rule 1.13(c) provides for withdrawal in certain cases: "If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer has 'good cause' to resign or withdraw, as appropriate, under Rule 1.16(b)(6)." For example, if despite a county attorney's best efforts in accordance with Rule 1.13(b), the board of county commissioners insists upon action that is clearly a violation of law and is likely to result in substantial injury to the county, and if the county attorney has a present attorney-client relationship with the board of county commissioners, the county attorney has good cause to resign or withdraw, as appropriate, from the attorney-client relationship with the board of county commissioners, if permitted by law. (fn12)

The question of whether Utah law imposes an

attorney-client relationship between a county attorney and a board of county commissioners or individual county officers, such that withdrawal is not possible, is a matter of substantive law external to the Rules of Professional Conduct. (fn13) Nevertheless, it is clear to this Committee that county attorneys and deputy county attorneys are ethically bound by the provisions of Rule 1.7, even if this means that in some cases a county attorney or deputy county attorney, on an individual basis, cannot ethically perform certain statutory duties.

Rule 1.13(f) provides:

A lawyer elected, appointed, retained, or employed to represent a governmental entity shall be considered for the purpose of this rule as representing an organization. The government lawyer's client is the governmental entity except as the representation or duties are otherwise required by law. The responsibilities of the lawyer in paragraphs (b) and (c) may be modified by the duties required by law for the government lawyer.

Although these and other provisions of Rule 1.13 may apply directly in matters involving § 17-5-206 pertaining to payments of county money, nothing in Rule 1.13 relieves a county attorney or deputy county attorney from complying with the confidentiality and conflicts rules of the Rules of Professional Conduct.¹⁴

If an action under § 17-5-206 to recover or restrain payment of county funds must be investigated, evaluated, filed or prosecuted, an individual evaluation and application of conflicts rules must be made as to each county attorney or deputy county attorney involved in the § 17-5-206 matter. If an individual county attorney or deputy county attorney is free from conflicts and therefore properly may undertake the § 17-5-206 matter, the fact that another attorney in the office could not do so, because of a current or former attorney-client relationship, does not bar the first attorney from participating in the matter, so long as adequate screening measures are established and enforced.

If an individual county attorney or deputy county attorney currently has an attorney-client relationship in any matter with a defendant in a contemplated action under § 17-5-206, that attorney may not participate in the § 17-5-206 matter directly or indirectly, whether in a supervisory role or otherwise, and may not have access to confidential information pertaining to the matter. The Committee believes that there are no circumstances where an attorney could reasonably believe that investigating, evaluating, filing or prosecuting a § 17-5-206 matter against a particular defendant would not adversely affect the attorney's current attorney-client relationship with that defendant.

D. Application of Rule 1.7. An official comment to Rule 1.7 states, in pertinent part:

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as an advocate against a client. . . . [G]overnment lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

We believe that a § 17-5-206 action against a current client of a county attorney or deputy county attorney to recover money paid or restrain the payment of money entails conflict to the degree prohibited by Rule 1.7.

Accordingly, we conclude that Rule 1.7 prohibits an attorney from participating in the § 17-5-206 matter against a current client, whether or not that attorney is the elected county attorney having express statutory duties pertaining to actions under § 17-5-206. A county attorney's statutory duties to bring actions under § 17-5-206 do not justify or excuse violations of applicable conflicts rules of the Utah Rules of Professional Conduct.

If an individual county attorney or deputy county attorney formerly had an attorney-client relationship in any matter with the defendant in a contemplated action under § 17-5-206, under Rule 1.9 that attorney may not participate in the § 17-5-206 matter if the former representation pertained to the payment in question or was substantially factually related to the payment in question, unless the former client consents after consultation. Furthermore, under Rule 1.9, the attorney could not use confidential information or information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client (fn15) or when the information has become generally known.

In all cases, appropriate screening procedures should be used to protect confidential client information. Appropriate screening procedures should also be used to prevent participation, supervision or control, whether direct or indirect, by a lawyer with a conflict in the § 17-5-206 matter, including a county attorney having statutory duties with respect to § 17-5-206 matters.

E. Organization of County Attorney's Office. The request submitted to the Committee inquired about a specific form of organization in a county attorney's office under which specific attorneys would be assigned, among other

responsibilities, ongoing responsibility for matters under § 17-5-206. Whether specific attorneys may undertake § 17-5-206 matters, however, pertains to their individual freedom from conflicts, which must be evaluated on a case-by-case basis, attorney by attorney. The specific form of organization in question, as described, does not address this required individual evaluation. Provided that each lawyer designated for § 17-5-206 matters is and remains free from conflicts individually, and provided that adequate screening measures are in place to protect confidential information and to prevent supervisory influence or control of the matter by a lawyer with a conflict, that form of organization does not create an ethical problem. (fn16)

Under Rule 5.1(b), each lawyer having direct supervisory authority over another lawyer in a county attorney's office has an independent obligation to make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct. Under Rule 5.2(a), a lawyer is bound by the Rules of Professional Conduct, notwithstanding that the lawyer acted at the direction of another person. Under Rule 5.2(b), a subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of a question of professional duty.

F. Obligation of Subordinates. The request submitted to the Committee asked whether a deputy county attorney could ethically obey the direction of a county attorney to undertake an action under § 17-5-206 if the county attorney determined that a conflict did not exist. The limited shield provided to subordinate lawyers under Rule 5.2(b) applies only if the supervisory lawyer's resolution of a question of professional duty is reasonable. This opinion determines that, as to current clients of a particular lawyer, there are no circumstances where a lawyer could reasonably believe that investigating, evaluating, filing or prosecuting a § 17-5-206 matter against a particular defendant would not adversely affect the attorney's current attorney-client relationship with that defendant. Thus, a county attorney's contrary direction to a deputy would not be reasonable. (fn17) As to past representations, a county attorney could make reasonable resolutions of questions arising under Rule 1.9 and, if the deputy obeyed, the shield provided by Rule 5.2(b) would apply. For example, a county attorney could make reasonable determinations of matters under Rule 1.9 such as whether the matters are the same or are substantially factually related and whether the interests in question are materially adverse. (fn18)

The request submitted to the Committee further inquired whether a deputy county attorney could direct a nonlawyer subordinate to investigate a potential defendant in an action under § 17-5-206 without violating Rule 5.3. Rule 5.3(c)(1) answers this question directly: "A lawyer shall be responsible for conduct of such a person [a nonlawyer

employed or retained by or associated with a lawyer] that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved." A deputy county attorney who, because of an individual conflict, could not investigate a potential defendant, could not ethically direct a nonlawyer assistant to do so.

G. Issues Not Addressed. As indicated in note 1, supra, several issues raised in the context of the ethical issues that we have addressed are beyond the scope of this Committee, and we decline to address them.

(a) We express no opinion on the legal questions of whether a county attorney's performing statutory duties to defend actions against the county or to give written opinions to county officers relating to the duties of their offices establishes, without more, an attorney-client relationship with the officer. Furthermore, we have not assumed that the performance of such statutory duties, without more, establishes an attorney-client relationship with individual county officers. We note in this context, however, the requirement of Rule 1.13(d) that, in dealing with a county's officers, employees, and constituents, a county attorney or deputy county attorney must explain the identity of the client when it is apparent that the county's interests are adverse to those of the constituents with whom the attorney is dealing. (fn19)

(b) We also express no opinion on the legal questions of whether and how a county attorney or deputy county attorney may form (or have by operation of law) an attorney-client relationship with individual officers of a county. (fn20) Because the request submitted to the Committee and the materials submitted in response both assumed that an attorney-client relationship between a county attorney or deputy county attorney and a county officer or county officers may be established under given circumstances, this opinion makes the same assumption. (fn2) **1**

(c) This Committee is not empowered to resolve conflicts, if any, between statutory duties and requirements of the Rules of Professional Responsibility. We can only opine on the ethical propriety of anticipated conduct of members of the Utah State Bar. (fn22)

(d) Finally, we express no opinion on legal questions concerning the authority of a county attorney to refer matters outside the county attorney's office.

Conclusion: In spite of their having statutory duties, county attorneys and their deputies are ethically bound, on an attorney-by-attorney basis, by the conflicts provisions of the

Rules of Professional Conduct.

Footnotes

1. Several relevant issues cannot be decided in this opinion because they are substantive issues of law whose determination is outside the scope of this Committee's duties. See Rules of Procedure for the Ethics Advisory Op. Com. of the Utah State Bar §§ I, III(b)(3) and IV(a). These issues are outlined in § G of this Opinion.

2. Utah Code Ann. § 17-18-1.6.

3. Utah Code Ann. §§ 17-18-4, 17-18-5(2)(b).

4. Utah Code Ann. § 17-18-2.

5. Utah Code Ann. §§ 17-18-1(8)(a), (c) (counties not within a prosecution district); 17-18-1.5(6)(a), (c) (counties within a prosecution district). In Utah, the officers of a county are: three county commissioners, a county treasurer, a sheriff, a county clerk, a county auditor, a county recorder, a county attorney, a district attorney in a county which is part of a prosecution district, a county surveyor, a county assessor, and any others provided by law. Utah Code Ann. § 17-16-2. In counties having a taxable value of less than \$100,000,000, the county clerk is an ex officio auditor of the county and performs the duties of the office without extra compensation. *Id.*

6. See Utah Code Ann. § 17-16-7 (every county officer may with the consent of the county legislative body appoint deputies and assistants as necessary for the discharge of official duties).

7. Utah Code Ann. § 17-16-8.

8. Under the Utah Rules of Professional Conduct, the client of a full-time county attorney or deputy county attorney is generally the county. See Rule 1.13(f) ("A lawyer elected, appointed, retained, or employed to represent a governmental entity shall be considered for the purpose of this rule as representing an organization. The governmental lawyer's client is the governmental entity except as the representation or duties are otherwise required by law."); see also Rule 1.13, cmt. ("The government lawyer's client is generally the governmental entity itself, but the client relationship may be further defined by statute, ordinance or other law.").

9. Utah Ethics Advisory Op. No. 142, 1994 WL 579860 (Utah State Bar).

10. The request before the Committee addresses the office of a full-time county attorney where all deputy county attorneys are full-time employees, and the analysis set forth in this opinion is made in that context. In the case of a

part-time county attorney who is associated in a firm with an attorney who is not a full-time deputy, the imputation of conflicts as provided in Rule 1.10 is appropriate.

11. See Rules of Professional Conduct 1.13, cmt.

12. See also *id.*:

A lawyer for the government may have a legal duty to question the conduct of government officials and perform additional remedial or corrective actions including investigation and prosecution. The lawyer may also have an obligation to divulge information to persons outside the government to respond to illegal or improper conduct of the organizational client or its constituents. The remedial option under paragraph (c) concerning resignation under Rule 1.16 may be inconsistent with the government lawyer's duties under the law. The obligation of the government lawyer may require representation of the public interest as that duty is specified by law.

13. See discussion in § G, *infra*.

14. See, e.g., Rule 1.13(e) ("A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7."); Rule 1.13(b), cmt. ("The authority and responsibility provided in paragraph (b) are concurrent with the authority and responsibility provided in other rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rule 1.6. . .").

15. Rule 1.6(b)(4), for example, provides that "[a] lawyer may reveal such information [relating to representation of a client] to the extent the lawyer believes necessary: . . . (4) To comply with the Rules of Professional Conduct or other law."

16. The request submitted to the Committee suggested that, in lieu of this form of organization, a county attorney's office might ask that the Utah Attorney General, a lawyer from another county attorney's office, or outside private counsel undertake an action under Utah Code Ann. § 17-5-206. If available, conflict referrals to attorneys outside the county attorney's office would be an appropriate means of addressing conflict issues, just as they are in cases involving private law firms.

17. See Rule 5.2, cmt.: "If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it."

18. See Rule 5.2(b), cmt.: "If the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a

question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged."

19. *See* Official Comment to Rule 1.13(d):

There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

20. *See* Utah Rules of Professional Conduct, Scope ("The Rules simply provide a framework for the ethical practice of law. Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. . . . Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.").

21. Cf. Rule 1.13(e) ("A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by a person or entity, other than the individual who is to be represented, properly authorized by the organization.").

22. *See* Rules of Procedure for the Ethics Advisory Opinion Com. of the Utah State Bar § I; Cf. Utah Ethics Advisory Op. No. 97-12, 1998 WL 32435 (Utah State Bar). Although Utah Code Ann. § 62A-4a-403 obligates any person who suspects a child has been subjected to abuse to report such conduct to the nearest law enforcement officer, it is not a violation of the Rules of Professional Conduct if the attorney does not disclose such information, but the attorney may, to the extent the attorney believes necessary, disclose attorney-client information as provided in Rule 1.6(b).

Rules Cited:

1.101.131.7