

Utah Ethics Opinions

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Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 98-09

Approved October 30, 1998

Issues: Is the Office of the Guardian ad Litem sufficiently similar to the Attorney General's Office to render it a "government agency" within the meaning of the Utah Rules of Professional Conduct, and if so, does Rule 1.10 concerning imputed disqualifications, apply to the Office of the Guardian ad Litem? Does Rule 1.11, "Successive Government and Private Employment," apply to the Office of the Guardian ad Litem?

Opinion: Both rules apply to the Office of the Guardian ad Litem. For purposes of Rule 1.10 the Office of the Guardian ad Litem is a "firm," but the Office of the Guardian ad Litem's government sponsorship and statutory duties also make that office a "government agency" for Rule 1.11 application. Under the Rules, the terms "firm" and "government agency" are not mutually exclusive and, in certain cases as with the Office of Guardian ad Litem both terms apply. Application of Rule 1.10 and Rule 1.11 serves to maintain confidentiality without unduly hampering the Office of the Guardian ad Litem from performing its duty to protect the best interests of children through hiring qualified attorneys.

Analysis: In response to an inquiry from the Office of the Guardian ad Litem, the Ethics Advisory Opinion Committee previously decided that that office is a "firm" for purposes of imputed disqualifications under Rule 1.10. (fn1) The Office of the Guardian ad Litem has submitted another request asking the Committee to reconsider the conclusion of Opinion 95-08 and to find that Rule 1.11 is the appropriate rule to apply to that office instead of Rule 1.10. As a request for reconsideration of a prior opinion, this request was not timely filed under our rules. (fn2) Nevertheless, because the request also raises a somewhat new issue involving Rule 1.11, we will grant a waiver of the 30-day requirement of Rule V(e)(1) and treat this as a late-filed request for reconsideration under our Rules of Procedure.

In Opinion 95-08, we found that the opportunity to discuss

cases with other Guardian ad Litem attorneys, access to common files and common supervision required the Office of the Guardian ad Litem to be considered as a firm for Rule 1.10 purposes. It is, accordingly, subject to the application of rules dealing with conflicts, including Rule 1.7 and its companion rule, Rule 1.10.

For these purposes, the Office of the Guardian ad Litem is not a government agency similar to the Attorney General's Office. First, the Utah Constitution broadly mandates that the Attorney General shall represent all the State officers, whose departments sometimes have conflicting interests, as well as undertake any other duties provided by law. (fn3) The Office of the Guardian ad Litem's statutory mandate is narrowly defined and limited to representing minors before the court. (fn4)

Second, the Attorney General does not always represent specific clients, while the Office of the Guardian ad Litem's statutory purpose is to represent the best interests of *specific individual clients*. For the purposes of determining whether an organization is a "firm" within the meaning of Rule 1.10, the identification of the structure and client is far more important than is the source of funding. Despite the fact that the government pays for the Office of the Guardian ad Litem, the office can still be a "firm" for conflicts purpose. For example, the government may hire a law firm to represent poor people in their personal law suits. This may be the only thing that the law firm does, and the government's funding may be the only source of income. Nevertheless, the law firm would still be a "firm" within the meaning of Rule 1.10.

For these reasons, the Office of the Guardian ad Litem is different from the Attorney General's Office, and we reaffirm our decision in Opinion 95-08 that the Guardian ad Litem is subject to full application of Rule 1.10.

We next turn to Rule 1.11, which deals with the ethical obligations of lawyers who move between government positions and private practice. In considering the applicability of Rule 1.11 to the Office of Guardian ad Litem, we note that Rule 1.10 and 1.11 are not mutually exclusive. The Guardian ad Litem's request makes the foundational assumption that only one of these rules should apply to it. We do not reach this conclusion. For the reasons detailed in Opinion 95-08 and outlined above, the Office has firm-like characteristics for purposes of Rule 1.10. Yet, there are similarities between the Office of the Guardian ad Litem and the Attorney General's Office. Both offices' attorneys operate without some of the personal economic motivations of private-firm attorneys, as the attorneys receive a salary and not an hourly rate or a contingency fee. (fn5) The attorneys also serve the public interest, find the

best solutions possible rather than serve only a client's desires, and are employees of the State for the purposes of indemnification. (fn6) Thus, the Office of the Guardian ad Litem does share qualities with the Attorney General's Office that allow for Rule 1.11 application.

As a government agency for Rule 1.11 application, the Guardian ad Litem can perform its statutory duties by hiring qualified attorneys while maintaining high ethical standards. Removing Rule 1.11 as a barrier for the Office of the Guardian ad Litem to hire qualified attorneys does not relax the individual lawyer's responsibilities under Rules 1.7, 1.8, 1.9, and 1.10. The Office of the Guardian ad Litem can employ procedures to screen conflicting lawyers from compromising client confidences.

An effective screen needs to be in place before the potential for improper disclosure exists (fn7) and will contain the following types of elements: (1) a prohibition against the disqualified attorney from any participation, discussion, or information regarding the conflicting matter, (2) a restriction on access to files concerning the matter as well as on access to the disqualified attorney's files and, (3) a memorandum circulated throughout the firm concerning the conflict of interest. (fn8)

Conclusion: Utah Rules of Professional Conduct 1.10 and 1.11 both apply to the Office of Guardian ad Litem: The office is a "firm" for purposes of Rule 1.10; and it is a "government agency" for purposes of Rule 1.11.

Footnotes

1. Utah Ethics Advisory Op. No. 95-08, at 10, 1996 WL 227375 (Utah State Bar).

2. Within 30 days of receipt of a response from the Committee under §§ V(b)(2) or V(b)(3), the recipient may seek reconsideration of Committee action by submitting a written request, outlining the factual, legal or policy considerations on which the request for relief is based.

Utah Ethics Advisory Op. Com. R. Proc. § V(e)(1)

3. Utah Const., art. VII, § 16. See also Utah Ethics Advisory Op. No. 142, at 2, 1994 WL 579850 (Utah State Bar).

4.(1) The court may appoint an attorney guardian ad litem to represent the best interests of a minor involved in any case before the court . . . ; (2) An attorney guardian ad litem shall represent the best interest of each minor who may become subject of a petition alleging abuse, neglect, or dependency, from the date the minor is removed from his home by the Division of Child and Family Services

Utah Code Ann. § 78-3a-912 (Supp. 1997).

5. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342, at 119-20 (the channeling of advocacy toward a just result as opposed to vindication of a particular claim lessens the temptation to circumvent disciplinary rules). See also *State v. Fitzpatrick*, 464 So. 2d 1185 (Fl. Sup. Ct. 1985) (the lack of economic motivations for the attorneys lessens the temptation to share confidences).

6. Utah Code Ann. § 78-3a-912 (7) (Supp. 1997) ("An attorney guardian ad litem appointed under this section, when serving in the scope of his duties as guardian ad litem is considered an employee of the state for purposes of indemnification under Title 63, Chapter 30, Governmental Immunity Act."); Utah Code Ann. § 63-30-10 (Supp. 1997) ("[i]mmunity from suit for all government entities is waived"). In Utah Code Ann. § 63-30-2 (Supp. 1997), a government entity is defined as a political subdivision. The Attorney General's Office is a political subdivision.

7. *Hunter Douglas, Inc. v. Home Fashions, Inc.*, 811 F. Supp. 566 (D. Colo. 1992) (screen in place before the disqualified attorney joined the firm).

8. See *id.*; *Scheissle v. Stephens*, 717 F.2d 417 (7th)

Rules Cited:

1. 10

1.11