

Utah Ethics Opinions

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Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 99-05

Approved July 30, 1999

Issue: What are the ethical implications of the Office of the Attorney General's proposed investigation to determine whether any Utah criminal laws were violated by the Salt Lake City Bid Committee for the Olympic Winter Games in view of the Attorney General's prior association with the Bid Committee?

Opinion: The Utah Rules of Professional Conduct apply to the Attorney General and to each lawyer in the Office of the Attorney General on an individual basis. An evaluation of the ethical issues raised by the investigation invites inquiry under Rule 1.11(c) and Rule 1.7(b). Based on our review of the limited facts before us, we believe that neither the Utah Rules of Professional Conduct, generally, nor Rules 1.11(c) and 1.7(b), specifically, prohibit the investigation per se. Because the analysis mandated by Rule 1.7(b) is fact- and context- specific, however, each lawyer responsible for or participating in the investigation has an affirmative obligation to undertake an independent evaluation as to whether the requirements of Rule 1.7(b) are satisfied at each stage of the investigation. At a minimum, such analysis requires that the Attorney General and each investigating lawyer reasonably conclude at each stage of the investigation that their respective duties to consider, recommend and carry out appropriate courses of action with respect to the investigation are not impaired by reason of any competing professional, personal or other interests.

ANALYSIS

Introduction. In early 1999, the Office of the Attorney General (the "Office") announced its intent to undertake an investigation to determine whether Utah criminal laws were violated by the Salt Lake City Bid Committee, which is being led by the Chief Deputy Attorney General (the "Investigation"). In view of the Attorney General's prior association with the Bid Committee, Utah's Solicitor General has requested an "ethics opinion or other guidance concerning the [Investigation] in view of the Attorney General's involvement with the Bid Committee."

Background. The Bid Committee, a Utah nonprofit corporation, was formed in 1988 to seek the nomination of the United States Olympic Committee ("USOC") to represent the United States in the international bidding process of the International Olympic Committee ("IOC") to be selected as the host of the Olympic Winter Games. Following the USOC's 1989 selection of Salt Lake City as the United States bid entry, the Bid Committee actively sought the 1998 Winter Games.

In August 1989, Utah's Attorney General, who was then in private practice, was invited to join the Bid Committee's newly expanded Board of Trustees (the "Board"). After attending the first two meetings of the Board, the Attorney General resigned from the Board because of her intervening appointment as Utah's Solicitor General. (fn1)

In 1991, the IOC awarded the 1998 Winter Games to Nagano, Japan. The Bid Committee then sought and, in 1995, was awarded the 2002 Winter Games. In late 1998, news reports indicated that Bid Committee representatives may have engaged in activities intended to influence IOC representatives improperly to award the Games to Salt Lake City. Numerous investigations concerning the efforts of Salt Lake City and other Olympic host cities followed. (fn2)

Applicability of the Rules. The Attorney General and each lawyer in the Office are subject to the Utah Rules of Professional Conduct. The Rules apply on an individual lawyer basis, and "[a]ny lawyer or supervising lawyer in [the Office] who cannot individually satisfy the requirements of [the applicable Rules] should not engage in the representation in question." (fn3) The Rules relevant to the issue before us are Rule 1.11(c), which governs successive private and government employment, and Rule 1.7(b) which governs conflicts of interest arising out of a lawyer's responsibilities to others or the lawyer's own interests. (fn4)

Application of Rule 1.11. Rule 1.11(c) provides in relevant part that, "a lawyer serving as a public officer or employee shall not . . . participate in a matter in which the lawyer participated personally and substantially while in private practice or non-governmental employment . . ." (fn5) The fundamental purpose of Rule 1.11(c), protection of client confidences when an attorney moves from private practice to government service, assumes an attorney-client relationship and an exchange of confidential information that must be protected after the attorney moves to government service. Our review of the information submitted to us indicates that there was no attorney-client relationship between the Attorney General and the Bid Committee that would have given rise to an expectation of privileged communications between the Attorney General

and the Bid Committee. The Solicitor General's request for ethics guidance states that "[a]t no time did [the Attorney General] act as the Bid Committee's lawyer." We accept this statement at face value and see nothing in the materials submitted to us indicating otherwise. However, application of Rule 1.11(c) is not limited to the government attorney's prior participation in a matter as an attorney. A "substantial participation" on a personal, non-attorney basis would involve a Rule 1.11(c) analysis. With the information supplied to us, we conclude that her personal involvement was not substantial. (fn6)

Because creation of an attorney-client relationship is fact-specific, it is incumbent on the Attorney General to evaluate independently her involvement with the Bid Committee and its individual members to determine whether an attorney-client relationship was created. We note, however, that even if (i) an attorney-client relationship existed, (ii) the Attorney General's association with the Bid Committee constituted a "matter" within the ambit of Rule 1.11, (fn7) and (iii) the Attorney General "participated personally and substantially" in the matter while in private practice, any resulting conflict of the Attorney General would not be imputed to the entire Office. A conflict of interest involving a lawyer moving from private practice to government service is strictly personal to the lawyer, and does not disqualify the governmental office to which the lawyer moves, so long as appropriate means are employed to protect against disclosure of confidential communications or information. (fn8)

Application of Rule 1.7. Rule 1.7(b) provides in relevant part that: "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless: (1) The lawyer reasonably believes the representation will not be adversely affected; and (2) Each client consents after consultation." (fn9)

Rule 1.7(b) is intended to prohibit a lawyer from representing a client when the representation would be impaired by the lawyer's responsibilities to others or by the lawyer's own personal interests. The principal comment to Rule 1.7(b) explains that loyalty to and representation of a client are "impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests."

Unlike Rule 1.7(a), which arises only in the face of an actual, direct conflict between two or more clients, Rule 1.7(b) "applies whenever representation of a client may be impaired or limited by the attorney's responsibilities to others, and does not depend upon the existence of an actual adverse relationship, 'direct' or not." (fn10) The focus of

Rule 1.7(b) is not on an existing or potential adverse relationship, but on the nature of a lawyer's responsibilities to others or the lawyer's own personal interests, and the extent to which such interests may limit the quality of the lawyer's representation of a client's interests. (fn11) "The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment." (fn12) Rule 1.7(b) "protect[s] against the risk that the pull of other interests will impair the quality of the lawyer's representation . . . [and] seeks to insure that a lawyer's range of options on behalf of A are not limited by responsibilities that the lawyer also owes to B, whether B is another client, a third party or the lawyer himself." (fn13)

While the competing interests influencing a lawyer's judgment may be apparent, the strength of the interests and the likelihood that they will eventuate into a conflict and impermissibly impact the lawyer's judgment may vary. Thus, we have avoided construing Rule 1.7(b) as establishing any bright-line rules and have consistently interpreted the rule to require lawyers to undertake a case-by-case evaluation of the relevant facts and circumstances in determining whether the Rule requires refusal or termination of representation. (fn14) Rule 1.7(b)'s inquiry, like its counterpart under Rule 1.7(a), is objective rather than subjective. In the past, we have not attempted to establish an exhaustive list of facts that a lawyer should consider when confronted with a potential conflict under Rule 1.7(b). While we continue that practice here, we believe that a proper Rule 1.7(b) analysis should involve consideration of at least the following factors: (i) the identity of the client, the client's interest and the existence, nature and strength of any potentially competing interests, (ii) whether representation of the client may be limited by such interests and, if so, the likelihood and materiality of the limitation, (fn15) and (iii) whether the lawyer undertaking the representation has reasonably concluded from an objective standpoint that the representation will not be adversely affected by any potential material limitation on the representation.

When evaluating whether a proposed representation is permissible under Rule 1.7(b), additional principles are relevant. First, the burden of balancing all relevant factors and determining the propriety of the representation is borne primarily by the lawyer undertaking the representation. When a lawyer has evaluated the competing interests and reasonably concluded that any limitations are surmountable, the lawyer's judgment will be set aside only if it is determined that a disinterested lawyer acting in good faith would have reached a different conclusion. (fn16) Second, the analysis mandated by Rule 1.7(b) is dynamic. Rule 1.7(b)'s proscription may operate to bar proposed representation or may require the termination of an existing,

ongoing representation. (fn17)

Here, the inquiry is whether the Investigation may be materially limited by the Attorney General's prior connection to the Bid Committee. In light of the limited facts before us and the individual, fact-specific and ongoing analysis mandated by Rule 1.7(b), we are unable to opine as to whether the Office's representation of the State, generally, or each lawyer's participation in the Investigation, specifically, in fact satisfies or fails to satisfy the requirements of Rule 1.7(b). To provide the requested ethical guidance, however, we make the following observations and suggestions which, in light of Rule 1.7(b)'s contextual approach, illustrate the considerations that the Attorney General, the Chief Deputy and each lawyer involved with the Investigation must make on an individual basis.

Because the Office decided to undertake the Investigation, we assume that the Attorney General concluded that the Investigation (i) would not be materially limited by her prior connection with the Bid Committee, or (ii) would not be adversely affected by any such limitation. Further, because the Chief Deputy Attorney General accepted responsibility for the Investigation, we assume that he and each attorney participating in the Investigation independently concluded that their respective participation (i) would not be materially limited by their loyalty or responsibilities to the Attorney General, any third party or by their own personal interests, or (ii) at a minimum, would not be adversely affected by any such limitation.

In doing so, each lawyer should have carefully considered (i) the nature and extent of the Attorney General's involvement with the Bid Committee (e.g., was she one of many who participated only at the general Board level with little or no day-to-day involvement in the Bid Committee's activities as would first appear, or was she involved in managing or carrying out the organization's day-to-day business), (ii) the duration of the Attorney General's connection to the Bid Committee, both formal and informal (e.g., did she have any form of continuing connection to or knowledge of the Bid Committee's activities even though her formal Board service was brief), and (iii) the likelihood that the Investigation could reach back to the period of time that the Attorney General was involved with the Bid Committee.

Moreover, the Chief Deputy and every other attorney participating in the Investigation should have considered, and must continue to consider throughout the Investigation, (i) the existence and strength of the pull of any competing professional, personal or other interests (reputational, employment-related, personal loyalty, friendship, etc.), and (ii) the likelihood that such interests could impair the attorney's duty to consider, recommend and carry out on

behalf of the State of Utah appropriate courses of action with respect to the Investigation. (fn18) To the extent that such considerations indicate that a lawyer could not reasonably conclude that his or her participation in the Investigation will not be adversely affected, the lawyer's participation must terminate.

CONCLUSION

Neither Rule 1.11(c) nor Rule 1.7(b) necessarily prohibits the Investigation by the Office of Attorney General. The Rules require, however, that a fact-intensive analysis be undertaken to assure that their requirements are satisfied. Accordingly, each lawyer has an affirmative obligation to undertake an independent evaluation as to whether the requirements of Rule 1.11(c), with respect to the Attorney General, and Rule 1.7(b), with respect to the Attorney General and each lawyer participating in the Investigation, have been and can continue to be satisfied throughout the course of the Investigation.

Footnotes

1. These facts are reflected in the official minutes of the relevant Board meetings, copies of which were attached to the ethics request forwarded to us. The Board minutes state that the Attorney General resigned "so as to avoid any conflict with her position with the State of Utah."

2. In addition to the Investigation, the IOC, USOC and Bid Committee undertook internal investigations, and the federal government launched various congressional and administrative investigations.

3. Utah Ethics Advisory Op. 142, 1994 WL 579850 (Utah St. Bar). *See also* Utah Ethics Advisory Op. 95-07 at 2, 1995 WL 581870 (Utah St. Bar); Annotated Model Rules of Professional Conduct, Rule 1.11 cmt. 2 (A.B.A. 3d ed. 1996).

4. Of course, all lawyers in the Office having direct supervisory authority over other lawyers in the Office must make reasonable efforts to ensure that the lawyers conform to the Rules. Utah Rules of Professional Conduct 5.1(b) cmt. 1 (1998); Utah Ethics Advisory Op. 98-06 at 8, 1998 WL 779174 (Utah St. Bar).

5. *See* Rule 1.11(c).

6. The information before us, however, is limited, and our review does not necessarily end the fact-specific inquiry that must be undertaken by the lawyer in question.

7. For purposes of Rule 1.11, the term "matter" means a particular "judicial or other proceeding . . . involving a specific party or parties." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975); *see*

also Poly Software Int'l. v. Yu Su, 880 F. Supp. 1487, 1492 (D. Utah 1995).

8. Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 1.11:401 at 364 (2d ed. Supp. 1998). *See* Utah Ethics Advisory Op. 142, 1994 WL 579850 (Utah St. Bar); *see also*, Utah Ethics Advisory Op. 98-06, 1998 WL 779174 (Utah St. Bar).

9."A client may consent to representation notwithstanding a conflict. However, with respect to . . . material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to representation under the circumstances, the lawyer involved cannot properly [seek consent or provide representation]." Utah Rules of Professional Conduct 1.7 cmt. 2 (1998). The question of what constitutes "client consent" under Rule 1.7(b)(2) with respect to entities represented by the Office of Attorney General is a matter of substantive law beyond our jurisdiction.

10. Hazard, *supra* note 8, §1.7:301 at 249 (2d ed. Supp. 1998).

11."The rationale behind the general rule on adverse personal interests is simple: when the interests of a lawyer and a client cross, loyalties are confused, and the lawyer's effectiveness is diminished." ABA/BNA Lawyer's Manual on Professional Conduct, available in Westlaw, at LMPC 51:401. *See e.g.*, S.C. Ethics Advisory Op. 93-38, 1994 WL 928279 (S.C. Bar) (professor who also serves as legal counsel to the institution where the professor teaches must take care to avoid involvement in any policy-making or other situation in which the lawyer's interest as a faculty member might interfere with his judgment as the institution's lawyer).

12. Utah Rules of Professional Conduct 1.7 cmt. 1.

13. Hazard, *supra* note 8, §1.7:301 at 249.

14. Utah Ethics Advisory Op. 98-13 at 3, 1998 WL 863904 (Utah St. Bar); Utah Ethics Advisory Op. 98-11 at 507, 1998 WL 779176 (Utah St. Bar); Utah Ethics Advisory Op. 98-10 at 5, 1998 WL 716634 (Utah St. Bar).

15. In contrast to Rule 1.7(a), which suggests that, in the absence of client consent, a proposed representation is forbidden whenever representation of one client would be directly adverse to another client, Rule 1.7(b) establishes a more flexible approach to conflict analysis. "Rule 1.7(b) . . . speaks to material limitations on the representation, suggesting that merely marginal limitations on the representation do not bar a lawyer's participation, if the other part of Rule 1.7(b) can be satisfied. Therefore, only "material" limitations trigger operation of the bar. . . ."

Hazard, *supra* note 8, §1.7:301, at 251.

16. Utah Rules of Professional Conduct 1.7 cmt. 2 (1998).

17. Although an attorney may have initially concluded that an existing conflict would not adversely affect the representation, the attorney must continually evaluate the nature and extent of any limitations on the representation. If at any time during the representation an objective, reasonable attorney would conclude that the representation is adversely affected by competing interests, the representation must be terminated. Hazard, *supra* note 8, §1.7:301 at 250. *See also* Kan. Ethics Advisory Op. 95-11 (Kan. Bar Assoc. Oct. 17, 1995).

18. A material conflict of interest of the type prohibited by Rule 1.7(b) may arise when a lawyer's professional interest governs the quality or results of the representation. For example, when a lawyer tailors the representation to protect the lawyer's own professional interests, rather than a client's legal interests, an impermissible conflict of interest arises. *See, e.g., Walberg v. Israel*, 766 F.2d 1071 (7th Cir.1985) ("[w]here a lawyer has a professional incentive to comply with a trial judge's wishes, such as ensuring that he receives further court-appointed cases from the judge, divided loyalties are created, and these too can either mandate disqualification or lead to a post-conviction finding of ineffective assistance of counsel").

Rules Cited:

1.7

1.11