

Utah Ethics Opinions

2001.

01-06A. USB EAOB Opinion No. 01-06A

UTAH STATE BAR

Ethics Advisory Opinion Committee

Opinion No. 01-06A*1

Issued June 12, 2002

¶ 1. **Issue:** May a private practitioner who serves as a part-time county attorney represent private clients in connection with protective-order hearings?

¶ 2. **Opinion:** The private representation of an individual by a part-time county attorney at a protective-order hearing is not a per se violation of the Utah Rules of Professional Conduct. However, the county attorney must fully inform the client that, if the client later becomes a criminal defendant in that county, the county attorney will not be able to continue the representation; he will not be able to defend the client in any criminal proceedings; and he will have to withdraw as counsel in the civil case. The county attorney must also determine, on a case-by-case basis, the likelihood that this potential conflict of interest between his prosecutorial duties and the interest of his private client will actually arise. If the likelihood that this will occur is relatively high, the attorney must obtain both the county's and the private client's informed consent to the representation.

¶ 3. **Facts:** An attorney has been declining to represent private clients at protective-order hearings in the county where the attorney serves as a part-time prosecutor as a result of objections made against such a representation by a lawyer practicing in that jurisdiction. The objecting lawyer has alleged an impermissible conflict of interest with the county attorney's prosecutorial duties that would arise in the event that the subject of the protective order were to violate the order and consequently become the subject of a criminal investigation. One of the county attorney's clients has been served with a protective order and required to appear at a hearing in an adjacent county. The county attorney intends to represent that client, since the hearing will be held in a jurisdiction where the county attorney does not have prosecutorial duties. The county attorney would also like to be able to undertake the representation of defendants to protective orders in the county where he serves as a part-time prosecutor, with the understanding that, if any of those clients were to violate their protective orders, he

would withdraw from prosecuting the criminal case and refer it to another prosecutor.

¶ 4. **Analysis:** The facts submitted to the Committee raise the issue of the ethical obligations of a part-time county attorney in regard to conflicts of interest that may arise from the county attorney's simultaneous private civil practice. The applicable standard is found in Utah Rules of Professional Conduct 1.7(b):

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.

¶ 5. An impermissible conflict of interest would arise in the event that an attorney were to represent a criminal defendant in the jurisdiction in which he serves as a part-time county prosecutor, since the interests of the county prosecutor's client (i.e., the public) are adverse to the interests of the criminal defendant. (fn1) Utah law clearly states the prohibition against such a representation: "A county attorney may not: (a) in any manner consult, advise, counsel, or defend within this state any person charged with any crime, misdemeanor, or breach of any penal statute or ordinance." (fn2) In *State v. Brown*, (fn3) the Utah Supreme Court articulated the public concerns supporting a per se rule against the private representation of a criminal defendant by an attorney with concurrent prosecutorial duties. Among those concerns are: the client's hesitation to confide in counsel known to be a prosecutor; the prosecutor's reluctance to attack the constitutionality of the laws that he is sworn to uphold; reluctance to vigorously cross-examine those officials on whom he relies in his prosecutorial role; and, more generally, the potential erosion of the public's confidence in the criminal justice system. (fn4)

¶ 6. However, in the situation under consideration here, the proceedings are civil in nature, rather than criminal. In our Opinion No. 95-03, we concluded that a part-time city prosecutor acting as a private practitioner may represent a defendant in a civil contempt proceeding, provided that the public is not a party to the proceeding. The Committee observed that the public-policy reasons sustaining a prohibition against a part-time prosecutor's involvement in the representation of an accused in a criminal case are not involved in a civil case. A civil protective-order case is not likely to entail the possibility that the part-time prosecutor will argue the constitutionality of the criminal laws that he is required to enforce, although he may need to attack the constitutionality of the civil protective order statutes and

cross-examine police officers vigorously if they are witnesses in the civil proceeding. (fn5) This should be addressed on a case-by-case basis. The issue here is, therefore, whether the possibility that the civil case might develop into a criminal investigation, or that the subject of the civil case might already be the subject of a criminal investigation, should in itself constitute the foundation for a conflict of interest under Rule 1.7(b) and thus force the part-time prosecutor to decline representation in connection with all civil protective orders.

¶ 7. The events that give rise to a protection-from-abuse proceeding may eventually constitute the basis for a separate criminal cause of action or for a contempt proceeding or criminal prosecution stemming from a future violation of the protective order. Accordingly, if the county attorney were to accept the representation of the defendant to a protective order at a time when no criminal investigation had been conducted, nor prosecution had begun, the attorney could later neither represent the defendant nor the county in such a criminal prosecution action, as it would be a violation of his statutory duties and of Rule 1.7. (fn6) Utah Rule of Professional Conduct 1.2(b) allows a lawyer "to limit the objectives of the representation if the client consents after consultation." Thus, if the county attorney is going to accept the civil representation, he and the client must expressly limit the scope of the services to be provided to the client under Rule 1.2(b) and agree that the representation would not extend to any criminal matter that might arise in connection with the protective order or the facts giving rise to the protective order in the first instance.

¶ 8. The determining factor in whether the county attorney can take the private matter should not be the possibility that the client might later be charged with a crime, but rather the fact that no criminal investigation had been instituted when he agreed to represent the client in the first instance. Should the county attorney subsequently learn that his client has become the subject of a criminal investigation (either as a consequence of his violation of the protective order or in the context of a criminal case arising out of the same events underlying the protective order), it would be improper for the county attorney to participate in the criminal investigation or any subsequent proceeding on behalf of any party. The institution of a criminal investigation or a prosecution would trigger a direct conflict between the county attorney's prosecutorial duties and the interests of his private client. He would have to withdraw from the representation of his client, now a defendant in a criminal matter, and he would have to refer the criminal case to another prosecutor. (fn7) Clearly, if the client in the protective-order action were to confess to criminal behavior in the context of an attorney-client communication, the prosecutor could not reveal those communications to law

enforcement officials.

¶ 9. It would be easy to argue that, as publicly elected officials holding an office of unusual responsibility, prosecutors should be held to the highest ethical standards and should have a duty not only to refer matters to another prosecutor in the event of conflicts of interest, but-in order to avoid the appearance of impropriety-to prevent and avoid those conflicts from the outset. Still, as a practical matter, we recognize that the problems facing rural counties, where the number of cases does not justify funding a full-time county prosecutor, must be addressed. Further, if we are to find it per se impermissible to undertake a civil case that might later give rise to a criminal investigation and thus result in the prosecutor's having to abstain from participating in the subsequent criminal case, we must find the ethical grounds for the prosecutor's disqualification from the civil representation in the Utah Rules of Professional Conduct.

¶ 10. The "appearance of impropriety," however, is not the standard set forth in the Rules. (fn8) The relevant comment to Rule 1.7(b) clarifies the meaning of the rule with respect to potential conflicts of interest by stating: "A possible conflict does not itself preclude the representation." The comment proceeds to explain that "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 in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client."

¶ 11. Thus, a county attorney faced with the decision of whether to accept the representation of a private client with respect to a protective-order hearing should carefully consider if, under the specific circumstances, it is likely that the events involved in the protective-order proceeding will give rise to a separate criminal case or that the client will violate the protective order and become the subject of a criminal investigation. If the likelihood that this will occur is relatively low, the attorney may undertake the representation, but he must fully inform the protective-order client of the possible future conflict of interest with the attorney's prosecutorial responsibilities and clarify that the civil client will not enjoy any benefit nor suffer any harm from retaining his services, and that the county attorney will be required to withdraw from the representation if the matter progresses to a criminal matter. This will enable the client fully to evaluate his original decision to retain the county attorney. If the likelihood is high that his client will be involved in a subsequent criminal proceeding, Rule 1.7(b) is applicable and the attorney must obtain not only the client's consent, but the county's informed consent as well. (fn9)

¶ 12. Finally, we also look at the situation where the county

attorney undertook the representation of a petitioner, rather than a respondent, in a protective-order proceeding. In that case, the issue is whether the county attorney could participate as a prosecutor in a criminal proceeding eventually instituted against the object of the protective order. The interests of the private client appear to be similar to those of the public in prosecuting a person who violates the protective order. However, the interests may also be divergent, as when the petitioner in the protective-order proceeding is later found to have exaggerated her charges. Given (a) the risk that the neutrality that characterizes a prosecutor's role could be compromised by the interest that the prosecutor and his private client have in the case, (b) the confidential information regarding the pending charges to which the county attorney would be privy as a result of his previous representation of the victim of the alleged abuse, and (c) the possibility of an actual conflict between the interests of the victim and the prosecuting authority, it would be unethical for the county attorney to continue in the protective-order case or to participate in the criminal proceeding under these circumstances. The county attorney would, therefore, be required to refer to another prosecutor any criminal case that might arise in connection with the protective order on the facts giving rise to that order and would be required to withdraw from the protective-order case as well. This potential for a subsequent conflict, therefore, yields the same need for an initial analysis of the likelihood of subsequent criminal proceedings as in the case of the potential respondent representation.

*This opinion amends Opinion No. 01-06, previously issued on July 2, 2001. Upon reconsideration, the Committee has concluded that the original holding of Opinion No. 01-06 is to be affirmed, but that certain aspects of the original opinion should be clarified. Accordingly, Opinion No. 01-06 is withdrawn, and this Opinion No. 01-06A issued in its place.

Footnotes

1. The exception contained in Rule 1.7(a) concerning clients' consent to direct conflicts would not apply because the public, as a party to the criminal proceedings, could not reasonably consent to the representation. *See, e.g.*, Utah Ethics Advisory Op. No. 99, 1989 WL 509365 (Utah St. Bar) (county attorney's statutory duties to collect delinquent support payments cannot be satisfied by the consent of the relevant state agency).

5. Utah Ethics Advisory Op. No. 95-03, 1995 WL 283826 (Utah St. Bar) (part-time city prosecutor may represent defendant in civil contempt proceeding if city or any other prosecutor's client is not a party to proceeding).

6. *See* Pa. Ethics Op. 90-12A, 1990 WL 709585 (Pa. Bar Ass'n) (where no criminal proceedings have been instituted,

part-time public defender or assistant district attorney may represent either party in protection from abuse proceeding, even though, by doing so, attorney may become disqualified from participation in subsequent criminal case).

7. *See* Utah Ethics Advisory Op. 98-01, 1998 WL 32436 (Utah St. Bar) (county attorney already involved in civil matter in which opposing party commits a crime need not withdraw from civil matter and can avoid conflict by referring criminal matter to another prosecutor); *but see* Pa. Ethics Op. 90-12A (attorney may be disqualified from participation in criminal case arising out of same incident involved in protective-order case, but he is not disqualified from contempt proceedings arising from violation of protective order, which are civil in nature).

8. Although the Utah Supreme Court in *State v. Brown* applied the "appearance of impropriety" standard, it did so in the context of a prosecutor's representation of a criminal defendant. The Court noted that "[a]n unavoidable appearance of impropriety is created when a prosecutor assists in the defense of an accused." 853 P.2d at 858. In the case under consideration, however, what is at issue is the prosecutor's private representation of a client in a civil matter, rather than a criminal matter. Moreover, as explained above, the other public-policy concerns expressed by the *State v. Brown* court are not involved in a civil case.

9. As was the case in Utah Ethics Advisory Op. 98-02, 19 WL 199532 (Utah St. Bar), we do not address the question of who or what body can provide "consent" on behalf of a Utah county for purposes of the county attorney's compliance with Rule 1.7(b).

Rule Cited:

1.7(b)