

Utah Ethics Opinions

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UTAH STATE BAR

Ethics Advisory Opinion Committee

Opinion No. 02-06

Issued June 12, 2002

¶ 1 **Issue:** May an attorney represent a client in a criminal matter where the attorney will have to cross-examine as an adverse witness a former client whom the attorney previously represented in an unrelated matter?

¶ 2 **Opinion:** In general, an attorney may represent a client in a criminal case where the attorney will have to cross-examine a former client whose interests are adverse to the defendant as long as the representations of the present and former clients are not substantially factually related and the attorney does not disclose or use any confidential information gained in the course of the former client's representation to his disadvantage, as provided by Rule 1.9.

¶ 3 **Analysis:** The examination of a former client as an adverse witness on behalf of another client presents a potential conflict of interest for the attorney that must be examined under the provisions of Utah Rules of Professional Conduct: Rule 1.9, which governs successive conflicts of interest; Rule 1.7(b), which deals with concurrent conflicts of interest; Rule 1.6(a), which governs the duty of confidentiality; and Rules 1.1 and 1.3, which set forth the duties of competency and diligence, respectively. The Committee concludes that the cross-examination of the former client by the attorney does not per se create a disqualifying conflict of interest. However, the specific facts and circumstances of the case may involve a violation of the foregoing rules, and it is the lawyer's responsibility to analyze the situation to determine whether there will be compliance with the applicable rules. (fn1)

¶ 4 Under Rules of Professional Conduct 1.9(a), an attorney may not represent a person "in the same or a substantially *factually* related matter in which that person's interests are materially adverse to the interest of the former client unless the former client consents after consultation." Unlike the ABA Model Code of Professional Responsibility, which requires that the matters be simply "substantially related," Rule 1.9 requires that the matters be "substantially factually related," thus focusing on the

factual nexus between the prior and current representations, rather than a similarity of legal issues. (fn2) If the attorney determines that the facts underlying the representation of the former client-witness are substantially related to the indictment of the defendant, then the attorney needs to assess whether the interests of the former client and the defendant are materially adverse. (fn3) Should the attorney conclude that the two representations are substantially factually related and that the interest of the former and present clients are materially adverse, the attorney would be faced with an impermissible conflict of interest that could be cured only by obtaining the former client-witness's consent to the representation of the defendant.

¶ 5 In cross-examining the former client, the attorney must also comply with the ethical obligation not to disclose any confidential information related to the representation of the former client. The cross-examination may create a tension between (a) the attorney's duty of loyalty to the client, which encompasses the duty to represent the client diligently and therefore to cross-examine the adverse witness vigorously, and (b) the attorney's duties to the former client-witness. The attorney will need to resolve any such tension within the boundaries of Rule 1.9(b).

¶ 6 Rule 1.9(b) prevents an attorney from using any information relating to the representation to the disadvantage of the attorney's former client, except as otherwise permitted by Rule 1.6, which governs confidentiality. Thus, the attorney must refrain from the use or disclosure of any information that is not expressly permitted by Rule 1.6 or generally known to the public. If the attorney has not learned any information during the representation of the former client-witness that could be used in the criminal proceeding to discredit the witness's credibility or otherwise pursue the defendant's interests, no actual conflict exists, and no conflict is likely to arise. (fn4) However, if the attorney has gained information that could be used to the disadvantage of the former client-witness, then the attorney should try to obtain the former client's consent prior to the disclosure. In the absence of such consent, the attorney must seek to withdraw from representing the defendant.

¶ 7 Even if the attorney concludes that an actual or potential conflict of interest that would be prohibited by Rule 1.9 does not exist under the particular circumstances, the attorney must comply with the provisions of Rules 1.7(b) and 1.4(b). Under Rule 1.7(b), an attorney is prohibited from representing a client if the representation may be materially limited by the attorney's responsibilities to a third person (here, the former client), unless the lawyer reasonably believes that the representation will not be

adversely affected and the current client consents to the representation. (fn5)

¶ 8 Also, pursuant to Rule 1.4(b), the attorney should explain the matter to the client to the extent reasonably necessary to enable the client to make an informed decision regarding the representation. The attorney, therefore, must evaluate whether the obligations to the former client-witness pose a material limitation to the representation of the defendant. If a material limitation exists or is likely to arise, the attorney should disclose the limitation to the client and, if the attorney reasonably believes that she can proceed because the representation will not be adversely affected, she should obtain her client's consent to the representation. (fn6)

¶ 9 An attorney, therefore, is not automatically precluded by the Utah Rules of Professional Conduct from cross-examining a former client in the course of representing another client, provided that (a) there is not a substantial factual nexus between the present and former representations and (b) the attorney is able to provide the client a competent and diligent representation and to cross-examine the former client-witness vigorously. If the attorney believes that the representation of the client may be limited by the attorney's obligations to the former client-witness, then the attorney must disclose the potential limitations and obtain the client's consent to the potential conflict. In the absence of consent in this situation, the attorney must seek to withdraw from the case. Also, if it is reasonably foreseeable that a conflict of interest may arise due to the possible use of confidential information related to his representation of the former client-witness, then the attorney must obtain the former client's consent to such disclosure or seek to withdraw. Finally, in a criminal case, it is good practice for the attorney to inform the court of any such conflict or potential conflict in order to facilitate a timely resolution of the issue. (fn7)

Footnotes

1. This opinion does not address the situation in which the adverse witness is a current client, rather than a former client, of the attorney.

2. *Houghton v. Dept. of Health*, 962 P.2d 58 (Utah 1998) (denying motion to disqualify attorney where there was no common factual nexus between prior representation of State and current representation of Medicaid recipients against State); see also *SLC Ltd. v. Bradford Group West, Inc.*, 999 F.2d 464 (10th Cir. 1993) (disqualification of attorney upheld because of close factual nexus between prior representation of debtor's general partner in loan workouts and subsequent representation of secured creditor in debtor's bankruptcy proceeding); *State v. Larsen*, 828 P.2d 487 (Utah Ct. App. 1992) (a substantial factual relation is

required to create a conflict of interest under Utah Rule 1.9(a)).

3. See *Wheat v. United States*, 486 U.S. 153 (1988) (attorney disqualified when he represented co-conspirators in criminal case and government intended to call one of co-conspirators as a witness); *United States v. Amini*, 149 F.R.D. 647 (D. Utah 1993) (government's motion to disqualify rejected when attorney had previously represented defendant's wife-codefendant in related proceedings but when interests of former client and defendant were not directly adverse and both client and former client waived any potential conflicts); *United States v. Valdez*, 149 F.R.D. 223 (D. Utah 1993) (defense attorney was not disqualified from representing criminal defendant when attorney had previously represented a government witness in an unrelated case and was not privy to any confidential information of former client-witness that could be used in criminal case); Ill. Adv. Op. 86-12, 1987 WL 383870 (Ill. State Bar Ass'n) (attorney may represent clients in criminal cases investigated by police officer when attorney had previously represented police officer in disciplinary proceeding but where there is no factual relationship between the two matters).

4. *United States v. Valdez*, 149 F.R.D. 223 (D. Utah 1993); *Houghton v. Dept. of Health*, 962 P.2d 58 (Utah 1998); *United States v. TA*, 938 F. Supp. 762 (D. Utah 1996) (no actual conflict of interest exists under Rule 1.9(a) when attorney does not have relevant confidential information); Pa. Ethics Op. 92-96, 1992 WL 810292 (Pa. Bar Ass'n) (defense lawyer may cross-examine former client who is adverse witness if past and present cases are entirely separate and lawyer does not use confidential information acquired during representation of former client); Conn. Ethics Op. 00-2, 2000 WL 1364223 (Conn. Bar Ass'n) (attorney may represent plaintiff in personal injury action when attorney had previously represented defendant in unrelated criminal matter provided that attorney did not gain information from previous representation that could be used to former client's disadvantage or that he obtained former client's consent).

5. To satisfy the consent condition of Utah Rule 1.7(b), *each client* must consent after consultation. In the case before us there is only one affected client—the criminal defendant. The attorney's former client is not a "client" from whom consent is required to comply with Rule 1.7(b). However, the former client's consent may be necessary if the attorney intends to use any information to the disadvantage of the former client. Utah Rules of Professional Conduct 1.9(b), 1.6(a).

6. In Utah Ethics Op. 145, 1994 WL 579851 (Utah St. Bar), we concluded that a law firm could not represent a defendant in the retrial of a criminal case in which the

investigator who had been involved in the State's investigation against the defendant is now a full-time employee of the firm. In that case, the lawyer's representation of the client would create an impermissible conflict of interest under Rule 1.7 because the representation would be materially limited by the risk of harm to the law firm or the investigator that would result from the impeachment of the law firm's own employee.

7. *See generally United States v. Valdez*, 149 F.R.D. 223, 228 (D. Utah 1993), where Magistrate Judge Ronald Boyce urged prosecutors to bring such issues before the court at an early stage of the proceedings.

Rules Cited:

1.9(a)1.9(b)