Utah Ethics Opinions

2003.

03-01. USB EAOC Opinion No. 03-01

UTAH STATE BAR
Ethics Advisory Opinion Committee

Opinion No. 03-01
Issued January 30, 2003

¶ 1 Issue: May a Utah Assistant Attorney General serve as
a hearing officer or other adjudicator for a Utah government
agency on a matter for which the Office of Attorney
General, which employs the attorney, may eventually
undertake an advocacy role?

¶ 2 Conclusion: Yes. Under the Utah Rules of Professional
Conduct, a lawyer's employment by the Office of Attorney
General does not, by itself and without the lawyer's
personal involvement in the matter before him, preclude the
lawyer from serving as a hearing officer for a governmental
agency in a matter the Office of Attorney General may later
undertake as an advocate for the agency.

¶ 3 Background: From a roster the Utah State Office of
Education maintain, (fn1) an attorney in the Utah Attorney
General's office was randomly selected to serve as a hearing
officer in a due-process hearing arising under the
Individuals with Disabilities Education Act ("IDEA"). (fn2)
Petitioners were the parents of a disabled child. Respondent
was the affected school district. The child's parents were
opposed to any Assistant Attorney General serving as a
hearing officer because they claimed a potential conflict of
interest between the Assistant Attorney General's role as an
impartial hearing officer and loyalty to his employer, which
eventually might represent the school district in an
advocacy role. Accordingly, Petitioners requested the
Assistant Attorney General to recuse himself as a hearing
officer.

¶ 4 On October 10, 2002, the hearing officer issued a
"Decision on Petitioners' Motion to Recuse Hearing
Officer," granting the Petitioner's Motion to Recuse, though
he concluded "Respondents' arguments [against recusal] are
far more persuasive and logically correct" than Petitioner's
arguments. Notwithstanding what he viewed as
Respondent's superior arguments, the hearing officer
recused himself because, among other reasons, he felt there
is "a lack of clear guidance on the conflict of interest issue,
and the current lack of any safe harbor from an ethics
complaint." The hearing officer subsequently requested an
Ethics Advisory Opinion from the Committee on this issue.
(fn3)

¶ 5 Analysis: At the outset, we stress our opinion on the
issue stated is necessarily limited to the scope of our
jurisdiction;&#8212;namely, whether an Assistant Attorney
General who serves as a hearing officer under the facts
summarized above will be in violation of the Utah Rules of
Professional Conduct. We do not opine on how the IDEA,
its supporting regulations and case law, the Utah Code of
Judicial Conduct or public policy may bear on the issue.
Our analysis and conclusion are, therefore, intentionally
narrow and should not be construed otherwise.

¶ 6 The primary rule applicable to this issue is Rule1.12 of
the Utah Rules of Professional Conduct. (fn4) By its terms,
Rule1.12 prohibits an Assistant Attorney General from
serving as a hearing officer and later representing either
party in any subsequent dispute. The rule likewise prohibits
any law firm an Assistant Attorney General may later join
from representing either party in the same matter, unless he
is screened and apportioned no fee, and the firm provides
notice to the appropriate tribunal. Rule1.12 does not,
however, preclude the Assistant Attorney General from
serving as a hearing officer when no other lawyer in the
Attorney General's office will represent either party before
that Assistant Attorney General when acting as a hearing
officer. An Assistant Attorney General's employment with
the Attorney General's office does not, by itself and without
personal involvement in the matter as an Assistant Attorney
General on behalf of the Attorney General's Office, violate
Rule1.12.

¶ 7 The word "lawyer" in subparagraph (a) of Rule1.12
applies only to an individual attorney and not his law firm.
This is clear from subparagraph (c), which permits a law
firm to undertake representation of a party involved in a
matter in which an Assistant Attorney General served as an
adjudicative officer provided he is screened and
apportioned no part of the fee. Under Rule1.12, the conflict
of interest is not necessarily imputed to an entire law firm.

¶ 8 Our analysis and conclusions are consistent with
accepted authority. Official commentary on Model
Rule1.12 summarizes the intent of the rule: "A lawyer who
has served as an adjudicative officer or judicial clerk may
not represent anyone in connection with a matter in which
the lawyer personally and substantially participated." (fn5)
The import of that statement, as the comment clarifies, is
that disqualification under the Rules of Professional
Conduct is required only if there is substantial and personal
conflict in the same matter. (fn6)
¶ 9 Likewise, our prior opinions on similar subjects follow the same logic. In Opinion 95-02A, (fn7) we held that a lawyer may represent criminal defendants in the same judicial district in which a law partner sits as a justice court judge, provided the lawyer does not appear before his partner. In our Opinion 142, we stated that "In these circumstances [e.g., when the Attorney General's office is representing various state agencies], the conflict of interest rules apply only on an attorney-specific basis, and conflicts in the Office of the Utah Attorney General should not be imputed to all attorneys in that office." (fn8)

¶ 10 Quoting ABA Formal Opinion 242, we noted in Opinion No. 24, (fn9) "One who assumes to act as a judge on one day and as an advocate the next in the same judicial system is confronted with inherent difficulties that ought to be avoided and deprecates the employment of such a system." Notwithstanding the broader ethical implications of this statement, Opinion No. 24 concluded there was no "disqualification [under applicable Utah rules] in your serving as pro-tem judge for misdemeanor matters in County B by reason of your full-time employment as a criminal-felony deputy county attorney in County A." (fn10) The essence of these opinions is that the Utah Rules of Professional Conduct do not preclude a lawyer from simultaneously serving in potentially incompatible roles, for instance as an adjudicator and an advocate, provided the precise matter at issue is not the same and the likelihood of conflicting loyalties is not direct and substantial.

Footnotes

1. There is apparently no shortage of qualified hearing officers on the roster, many of whom are not government lawyers, and who would, presumably, not be objectionable to anyone.

2. The IDEA is codified at 20 U.S.C. §§ 1400 et seq. The IDEA requires school districts to provide a free appropriate public education and related services to students with disabilities. Anyone alleging a violation of IDEA must exhaust administrative remedies before filing a complaint in federal court. IDEA, its implementing regulations, and state rules provide for an administrative hearing before an impartial and unbiased hearing officer. The decision of the hearing officer is appealable to either state or federal court. Hearing officers by statute and regulation are limited to hearing complaints relating to the identification, evaluation, and educational placement of a child with a disability, or the provision of a free appropriate public education to the child.

3. We also received a companion request for an opinion on the same set of facts and circumstances from the school district that was the respondent in the proceeding that gave rise to the original request for an ethics opinion. The two requests were consolidated by the Committee, and this Opinion resolves both requests. The Committee also acknowledges receipt and consideration of filings submitted by counsel for the child who was the petitioner in that hearing.

4. All three participants in the IDEA proceeding agree that Rule 1.12 is the key to the analysis:

Former judge or arbitrator.

(a) . . . [A] lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such a person, unless all parties to the proceeding consent after consultation.

...

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) The disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) Written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule. Utah Rules of Professional Conduct1.12 (2002).


6. See, e.g., Mississippi Comm’n on Judicial Performance v. Atkinson, 645 So. 2d 1331 (Miss. 1994) (setting bail for accused while acting as municipal judge and thereafter seeking to have bail reduced while acting as practicing lawyer representing accused amount to conduct prejudicial to administration of justice, warranting public sanction).


10. Opinion No. 24 was issued when the Utah Code of Professional Responsibility governed attorneys' behavior. The principle is the same under the Utah Rules of
Professional Conduct.

Rules Cited:

1.12