Utah Ethics Opinions

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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—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 offices 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).

5. ABA Comm. on Evaluation of Professional Standards, Ann. Model Rules of Professional Conduct, 189 (4th ed. 1999).

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).

7. Utah Ethics Adv. Op. 95-02A, 1996 WL 73352 (Utah St. Bar). Utah ethics opinions are also available on the Utah State Bar website at:

http://www.utahbar.org/opinions/index.html.

8. Utah Ethics Adv. Op. 142, 1994 WL 579850 (Utah St. Bar).

9. Utah Ethics Adv. Op. 24 (1976 Utah St. Bar).

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