

## Utah Ethics Opinion

2012.

### 12-01. UTAH STATE BAR ETHICS ADVISORY OPINION COMMITTEE Opinion Number 12-01

Opinion No. 12-01

Issued January 10, 2012

#### ISSUE

1. Three related questions are before the Committee. The attorney states that she separately represented a woman and a man (the "wife" and "husband," respectively), both prior to their marriage. She subsequently represented both parties after they were married. The parties subsequently went to trial seeking a divorce (the "divorce"). The first question is whether representation of the wife, prior to the marriage of the parties, in litigation (the "separate action") constitutes a conflict which would preclude the attorney from representing the husband on appeal in the divorce? Second, does the fact that the attorney testified at the divorce trial as a percipient witness, preclude her from representing the husband on appeal. Third, does representation of the wife in litigation involving both husband and wife against a third party during the course of their marriage (the "joint litigation"), wherein, notwithstanding the attorney's vigorous but unsuccessful advocacy of the wife's position, the wife was dismissed from the case, preclude the attorney from representing the husband on appeal in the divorce, particularly where the attorney now believes the trial court was correct in dismissing the wife from the joint litigation?

#### OPINION

2. Because it does not appear to "involve" a "substantially related matter," representation of the wife in the separate action prior to the marriage would not necessarily preclude the lawyer from representing the husband on appeal in the divorce. The mere fact of the wife's dismissal or that the lawyer agreed or disagreed with the court's decision dismissing her from the joint litigation involving both parties is not a determinative factor to this opinion. The fact that the lawyer testified during the divorce proceedings as a percipient witness, is likewise most likely not a relevant factor, subject to the caveats set forth in the Analysis below. Where, however, the lawyer represented both the husband and wife against a third party in the joint litigation during the course of the marriage, the joint litigation and the divorce appear to be "substantially related" because they "involve the same transaction or legal dispute." It would therefore be a violation of the duty of loyalty and

independence under the Utah Rules of Professional Conduct for the lawyer to undertake representation of the husband on appeal in the divorce without the informed written consent of the wife.

#### BACKGROUND

3. Prior to the marriage of the parties involved, the attorney represented the wife in the joint litigation. The issues before court in no way involved the future husband. Subsequently the parties married. During the course of their marriage, the attorney represented both husband and wife against a third party in the joint litigation. The wife's standing to sue was at issue in the joint litigation and in spite of the lawyer's vigorous advocacy of her position, the court dismissed her from the litigation. The lawyer disagreed with this ruling at the time, but later came to accept the court's decision as a correct one.

4. The couple then initiated divorce proceedings. The attorney recognized that there would be an obvious conflict and thus declined to represent either party at trial. As a result of the long standing attorney-client relationship with the husband, the attorney was called and did testify as a percipient witness regarding the husband's procurement of certain property rights and other matters which were apparently not a violation of confidentiality or otherwise privileged under the Utah Rules of Professional Conduct. According to the attorney, she did not assume a position advocating on behalf of either party in the trial court and testified only as to non-contested issues. She represents that on appeal she would not be placed in a position of advocating her own credibility as a witness at the trial. However, representation of the husband on appeal of the divorce would perhaps, although not necessarily, require the attorney to argue that at least one of the positions, specifically in the joint litigation matter, previously advocated by the lawyer on behalf of the wife in that litigation, was incorrect.

5. The husband is appealing the trial court's decision regarding the division of property and property rights between the couple in the divorce proceeding. He has requested the attorney to represent him against the wife in the appeal.

#### ANALYSIS

6. General principles regarding conflicts of interest are set forth at the outset of the Comments to the Rules of Professional Conduct 1.7, Conflict of Interest: Current Clients. Pertinent to the Committee's discussion of the issues raised, Official Comment (1) to Rule 1.7 states that,

(1) Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent Conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyers own interests. . . .

7. The duty of loyalty is further explored in Comment (6) to Rule 1.7 in its discussion of circumstances where the conflict involves concurrent directly adverse positions, which, while not directly applicable to this discussion, is helpful in understanding the philosophy behind the rule:

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. . . . (emphasis added).

8. Regarding former clients, Official Comment (9) to Rule 1.7 directs attention to Rule 1.9, stating that, ". . . a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 . . ."

Rule 1.9, Duties to Former Clients, of the Rules of Professional Conduct, subsection (a), states that,

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

9. Official Comment (1) to Rule 1.9 makes the following observation:

After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. . . .

. (emphasis added).

10. The critical question therefore is whether the prior matters in which the lawyer represented the either or both parties are "substantially related" to the divorce. It is important under Rule 1.9(a) to make a determination as to the "scope" of a prior matter in order to determine if it was "substantially related." Comment (2) to the Rule states,

(2) The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific a transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. . . . The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question. (Emphasis added)

11. Additionally, Official Comment (3) to Rule 1.9 addresses the question of whether matters are "substantially related" as follows:

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. . . . (emphasis added).

12. Consequently, whether the two prior representations of the wife preclude the lawyer's representation of the husband on appeal under Rule 1.9(a) essentially comes down to the question of whether either of those representations of the wife were "substantially related matters" to the divorce action under Rule 1.9(a), taking into consideration the "scope" of the lawyer's representation of the wife in those matters. As indicated in Comment (3) a "substantially related matter," in order to preclude representation, may not necessarily implicate the proscription against violating the duty of confidentiality. Even though the concern regarding confidentiality may not be material, the duty of loyalty remains a major concern. The prior litigation may simply "involve the same transaction." If it does, it is substantially related and precludes representation of the husband without the wife's informed written consent.

13. At the core of Rule 1.9 is the lawyer's continuing duty of loyalty to former clients. The Annotated Model Rules of

Professional Conduct, from which many of the Utah Rules of Professional Conduct are derived, provides pertinent guidance. It states as follows:

Once it is established that there was a lawyer-client relationship and that it has ceased, the next issue in determining whether a lawyer may undertake a representation adverse to a former client is the relationship between the two matters: if the two matters are substantially related, the subsequent adverse representation is prohibited.

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The substantial-relationship test grew out of case law on disqualification. See *T.C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265 (S.D.N.Y. 1953) ("the former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him").

The test protects "not only confidences but also the expectation of loyalty by a prior client." *I Successor Corp. v. Feld Group Inc.*, 321 B.R. 640 (Bankr. S.D.N.Y. 2005) (collecting cases); see *People v. Frisco*, 119 P.3d 2093 (Colo. 2005)(en banc) ("Because the use of information . . . is separately restricted by Rule 1.9(c), Rule 1.9(a) applies only to situations involving an inherent and substantial risk of violating an attorney's duty of loyalty to former clients."; *Nationwide Assocs., Inc. v. Targee St. Internal Med. Group, P.C.*, 758 N.Y.S.2d 108 (App. Div. 2003) (lawyer in breach of contract action had represented other side in substantially related mortgage foreclosure actions; conflict of interest required disqualification under state's analogue to Rule 1.9(a), even if no confidential information involved); *Centerline Indus., Inc. v. Knize*, 894 S.W. 2d 874 (Tex. App. 1995)(lawyer must be disqualified even though all confidences obtained from former client had been disclosed in another proceeding: "if two matters are substantially related(.) it should make no difference whether the lawyer gained no confidences or whether all the confidences gained have been publicly disclosed").

*Id.*, p. 162.

14. With this background, the Committee turns to the specific questions. As to the first, it is the Committee's opinion that the previous representation of the wife in the separate action would not preclude the lawyer from representing the husband in the divorce on appeal because it does not appear to "involve" a "substantially related matter." Unless there is something which would demonstrate that the husband was somehow "involved" in that matter, i.e., either arguably received some palpable benefit or suffered some appreciable detriment as a result

thereof, the lawyer's representation of the wife in the separate action would not preclude her from representing the husband in the divorce proceeding on appeal.

15. As to the question of the lawyer's representation of the wife and advocacy of her position, along with her husband, in the joint litigation, such representation would in fact preclude the lawyer from representing the husband on appeal in the divorce matter. Before addressing this directly, the Committee observes that two related items raised by the lawyer would seem to be irrelevant to the analysis. First, whether or not the lawyer was successful in representing the wife or personally now agrees with the court's decision in the joint litigation is of no consequence and is plainly irrelevant to the issue of whether the lawyer can represent either party on appeal in the divorce. Second, the fact that the lawyer testified as a percipient witness to facts outside of the lawyer-client relationship at the divorce trial, advocating for neither party, would seemingly have no bearing on the question posed, particularly if the lawyer testified only as to non-contested matters. Although Rule of Professional Conduct 3.7, which prohibits attorneys from acting as both an advocate and testifying at trial, does not apply to service as appellate counsel, the Committee believes that a lawyer should be extremely cautious in undertaking the representation of a party on appeal in which the lawyer has testified during trial as to contested factual matters and/or where the lawyer's testimony might be the subject of scrutiny by the appellate court.

16. The critical question is whether, having represented the wife in the joint litigation, involving both husband and wife and specific advocacy of the wife's interests, it was "substantially related" to an issue or cause arising in the divorce. In this regard, the Committee observes that the lawyer determined at the trial level that she could not represent either party because there was a clear and obvious conflict of interest in representing either one of them against the other at that stage. This is undoubtedly because, inter alia, the issue of the division and value of property in the divorce proceedings could be readily determined to be substantially related to issues raised in joint litigation. Applying the "involves the same transaction" test set forth above, that litigation would be a "substantially related matter."

17. The Committee readily concedes that it is likely true at the appellate level, as the lawyer points out, that there would be little risk that she would be put in a position of exploiting any attorney-client confidential information or privilege, and would not be "testifying" in her representation of the husband on appeal. There are other factors, however, which are determinative of the outcome of the lawyer's question. Specifically, there is every reason to believe that the wife would justifiably feel betrayed by what she would perceive as the lawyer's "changing sides" in the

divorce matter. This of course calls to the forefront the issue of whether the lawyer's appellate representation of the husband in the divorce matter would be a violation of her duty of loyalty. The Committee believes it would. In the context of the specific facts of this inquiry, it is important to understand, and we emphasize, that Rule 1.9 of the Utah Rules of Professional Conduct draws no distinction between whether a matter is at the trial level or on appeal. A lawyer's duty of loyalty to a client survives and is equally as applicable at the appellate level as it would be in the trial court.

18. Inasmuch as the joint litigation and the divorce appear to be "substantially related" because they "involve the same transaction or legal dispute," at least to some degree, it would be a violation of the attorney's duty of loyalty to the wife to undertake representation of the husband in the divorce matter without informed written consent from the wife.