

Utah Ethics Opinions

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3. USB EAOB Opinion No. 3

Ethics Advisory Opinion No. 3

Approved December 1, 1971

Summary: A special assistant attorney general should not represent clients in civil matters against the state unless both parties consent after full disclosure

A public officer cannot consent on behalf of a public body; however, a legislature may, by law give consent in conflict of interest situations.

Even with consent of both parties after full disclosure, it is almost always improper for a county attorney to represent clients in civil cases against the state.

Opinion: Two questions are posed by this ethics inquiry: 1) would a special assistant attorney general, whose only duties are those of enforcing support and family obligations on behalf of the state, be precluded from handling matters against the state for his private client, in which the attorney general would be involved, such as condemnation matter; and 2) does the election of an attorney to the office of county or district attorney preclude that attorney from handling matters adverse to the state, such as condemnation matters?

The problems do not involve the handling of criminal matters, and the following is addressed to civil matters only.

The Canons called into question by these two inquiries appear to be Canons 6 and 29. Canon 6 states:

"It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment

from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

The applicable part of Canon 29 is as follows:

"The lawyer * * * should strive at all times to uphold and to maintain the dignity of the profession and to improve not only the law but the administration of justice."

Addressing the inquiry first to question No. 1 as propounded, it appears that the possibilities which exist and which would be frowned upon would be, first, that by reason of his public position he might be able, on behalf of his private client, to obtain an advantageous negotiation with the State, his public client; second, that he might, because of his public position, be in a position where his private client might suffer because of his loyalty to his public client; third, that he might be able to influence the outcome of the private client's matter by reason of information which he might obtain by virtue of his public position; fourth, that he might jeopardize his private-client's case by virtue of information which he might divulge to his public employer.

While we would assume that no ethical attorney would be guilty of any of the matters outlined, and that none of these matters would occur, this does not answer the problem which is, that to the layman the ambivalent position of the lawyer is such that the layman might well conclude that the attorney is using either his private position to further his professional success for the other; hence an apparent conflict of interest. We conclude that an apparent conflict of interest and the opportunity for such actions would be as bad as an actual conflict of interest.

It would appear that the fact that the attorney was a part-time employee with the state would make no difference, nor would the fact that he is dealing with the same type matters in his dual capacity.

In this regard, Informal Opinion 674 of the American Bar Association Committee on Professional Ethics is persuasive. In that opinion the question posed was whether a law firm could handle a state tax matter for a long established client when an associate of the firm was a part-time member of the staff of the attorney general. It was specified in the facts that the part-time attorney general would have no contact with the tax matter on behalf of the attorney general, and that he had not heard the matter discussed in the firm. The opinion held that the fact that the employment was part-time was immaterial, and that the firm could not continue the representation of the client. The opinion did; however, leave open one avenue under Canon

6, that of consent of both parties upon a full disclosure of the conflict of interest to both clients.

Numerous opinions of the ABA Ethics Committee have indicated that a public officer is not in a position to consent on behalf of the public body. A more recent opinion, Formal Opinion 306, however, holds that the legislature can, by law, give consent in conflict of interest situations where, by statute, they authorize a legislator to reveal his personal interest and abstain from voting, where a member of his law firm is acting as a lobbyist. This opinion passes no judgment upon whether an attorney general might have the same authority.

It is our opinion, that in the absence of express consent, a special assistant attorney general could not represent private clients in matters where he would be opposing the office of the attorney general.

It is also our opinion, even assuming that there is authority for the attorney general to consent and the private client consents, that the possibility of the lay public misinterpreting the situation is still a matter of paramount concern under Canon 29.

The second question adds only one new fact, the interrelation of the county attorney office or district attorney office with that of the attorney general.

Section 67-5-1 sets forth the duties of the attorney general in relation to the offices of the district attorney and county attorney, as follows:

"(5) To exercise supervisory powers over the district and county attorneys of the state in all matters pertaining to the duties of their offices, and from time to time require of them reports as to the conditions of public business entrusted to their charge.

(6) To give his opinion in writing . . . to any county attorney, when required, upon any question of law relating to their respective offices."

The duties of the district attorney specified by statute (Section 67-7-4) include the following:

"The District Attorney shall, when it does not conflict other official duties, attend to all legal business required of him in his district by the Attorney General, without charge, when the interests of the state are involved . . ."

67-7-5: "The district attorney shall appear in . . . all civil cases in which any county of his district may be interested when required to do so by the County Commissioners, and render such assistance as may be required by the attorney general in all such cases that may be appealed to the

Supreme Court."

There is no additional description of the duties of the county attorney - attorney general relationship listed under duties of county attorney. Those listed relate to his duties in criminal matters and as adviser to the county commission and suits of civil nature involving the county.

Whether in practice the attorney general calls upon the district attorney for assistance in state matters to any substantial degree would appear to be immaterial. From the wording of the statutes it is apparent that the district attorney could be called upon to handle the trial of condemnation cases, among others.

It appears that the statutory relationship is such that all of the objections which would be obtained in the instance of the deputy attorney general or special deputy attorney general would apply, and that the apparent conflict of interests of the attorney general and the state's district attorney on opposite sides of a civil case, where the latter is representing a private client could create a climate for lay distrust, since both are elective state offices.

Finally, with relation to the county attorney - attorney general relationship: The county attorney is a local elective officer, paid by the local political subdivision.

Although it is true that the statutory duties of the county attorney in relation to the attorney general are more limited, and although there is apparently no statutory authority broadening his duties at the direction of the attorney general as is the case with the district attorney, he must report to the attorney general who has general supervisory powers over him in relation to the duties of his office, Section 67-5-1(5), Utah Code Annotated 1953.

He is a public attorney, and all of the objections discussed heretofore in relation to the district attorney - attorney general exist, so far as the situation is apparent to the average layman.

It would appear that the actual conflict of interest would be less than in the attorney general - district attorney relationship, and it may be that in some instances, that which would appear to be a conflict in the eyes of the layman could be lessened to the extent that we could not, in a blanket indictment, say that it is never proper for a county attorney to handle a civil case in which the attorney general's office is involved on the opposite side. However, certainly a correspondingly greater burden resides on the individual county attorney in such situations to make certain no implication of impropriety can arise which would lead the layman to the conclusion that the county attorney is using his public position to further his personal success in the individual private case, or that he is using his private

business matter to enhance his public position.

It would appear that a county attorney would be required to be extremely circumspect, and that the case in which he might properly appear for a private client in opposition to the office of the attorney general would be rare.

References: Canon 5; Canon 9.