

Utah Ethics Opinions

1979.

56. USB EAO Opinion No. 56

Utah State Bar

Ethics Advisory Opinion No. 56

Approved April 12, 1979

Summary: An attorney may not ethically represent some stockholders in a derivative action against a corporation when he previously acted as corporate counsel.

Comments: See also, Utah Opinions 29 and 40.

Facts: The Ethics Committee has been presented with the following set of facts: An attorney is one of about 150 shareholders in a financial corporation. He also acts as general counsel to the corporation. There is presently existing a tender offer dispute. He has been approached by the president of the corporation, who is also a board member and a shareholder, for legal advice affecting the corporation. He has also been approached by the chairman of the board of directors, another shareholder, for legal advice. The chairman of the board now wishes the attorney to represent him and other shareholders in a derivative shareholder's suit. The attorney wishes to know if such representation would constitute a conflict of interest. The answer to the question appears to be an unequivocal yes.

Opinion: In Utah Opinion 40 an attorney inquired whether or not he could represent a client wishing to sue a corporation which formerly employed the attorney as general counsel. The attorney stated that he had no knowledge of any secrets or confidences relating to the corporation. The Committee in that instance held that Canon 4 of the Utah Rules of Professional Conduct, DR 4-101, the attorney could not accept such employment. As general counsel for the corporation, he was familiar with the business dealings of the corporation, its agreements and all policy matters. Thus, he was prohibited under DR 4-101(A) and (B) from thereafter proceeding against the corporation. Similarly, in Utah Opinion 24, it was held that an attorney is precluded from representing a municipality in an action against a corporation which the lawyer previously represented and which involves matters related to the prior representation of the company.

The American Bar Association has also considered this problem in Informal Decision 516 (1962). The attorney in that situation had represented a family corporation having

seven stockholders for several years. Conflicts as to management policies arose. The attorney believed that there has been improper management and that the present management should be discontinued or substantial loss would result to all the stockholders. One of the stockholder-directors sought to employ the attorney to bring proceedings to liquidate the corporation. The Committee cited former Canon 6 having to do with the duty to maintain confidences of clients and held that the attorney was precluded from accepting this employment. Furthermore, the Committee cited Formal Opinion 85 where it was found to be "improper for the general counsel of the corporation to act as proxy for one contending group of stockholders or to solicit support therefore, at an election of directors where there is a contest involving future management. In our opinion, the loyalty you owe this corporation, your client, under Canon 6, prevents you from representing stockholders who are seeking to eliminate the corporation."

Therefore, the attorney may not accept the proffered employment on behalf of certain stockholders in the corporation in opposition to his original client, the corporation.

Rule Cited:

Canon 4