

Utah Ethics Opinions

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68. USB EAOO Opinion No. 68

Utah State Bar

Ethics Advisory Opinion No. 68

Approved November 16, 1979

Summary: A private attorney may not be appointed as special counsel by the attorney general for purposes of enforcing the Take-Over Disclosure Act when he or his law firm regularly acts as legal counsel for the offeree company involved in the take-over effort.

Comments: See also, Utah Opinions 3 and 56. Utah's Take-Over Disclosure Act was repealed in 1983.

Facts: Pursuant to Utah's "Take-Over Disclosure Act" (Utah Code Annotated Section 61-4-1 et. seq., 1953), the Utah Attorney, General may act as legal advisor to the state securities commission in enforcing the provisions of the Act. (Section 61-4-12). A "takeover offer" is defined in the act and registration and disclosure requirements are set forth. The purpose of the Act is defined in Section 61-4-2 as follows:

"In enacting this, it is the purpose of the legislature to protect, through disclosure, shareholders of corporations which are important to the economy and welfare of the people of Utah, recognizing that the state has a strong and legitimate interest in such corporations and in the protection of shareholder's informed investment decision should be based on material information, pertinent to the qualifications and plans of any person soliciting the acceptance or rejection of the offer. The act seeks to allow for full market assimilation of disclosed information before shareholders shall act. The act is not to be construed as favoring either management or the offeror, but rather as a neutral attempt to protect shareholders, the protection of said shareholders being a subject of valid state interest." (As amended 1979).

The Act also sets forth requirements as to content and filing of any solicitation material sent to offerees by either the offeror or the offeree company (Section 61-4-5).

The question posed to the Committee is as follows: Is it ethically permissible for a private attorney retained by the attorney general's office to represent the commission in enforcing the Take-Over Disclosure Act when he or his law office regularly acts as legal counsel for the offeree

company involved in the same take over effort?

Opinion: The relevant ethical principles are contained in Canons 4 and 5. Canon 4 prohibits an attorney from revealing confidences or secrets of a client except after full disclosure and obtaining of con-sent from that client. Canon 5, dealing with conflict of interest problems directs in DR 5-101(A) as follows:

"Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interest.

DR 5-105 is also applicable as follows:

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment or if it would be likely to involve him in representing differing interest, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-133(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

It is first necessary to analyze the identity of the client or interest sought to be represented under the act. The act's purpose as quoted above, is to require full disclosure of all pertinent information in a take-over effort, for the benefit of the offeree shareholders and the people of Utah. Therefore, it would seem that the attorney herein is representing the state and, indirectly, the shareholders of the offeree corporation. The initial question then is, how does the representation as a state attorney affect the duty owed to the private client, the offeree company? A question of fact would arise in each situation, as to whether or not the attorney would be required to disclose secrets or confidences of his private client in his role as Utah Securities Commission's counsel. Since the Act makes certain requirements of the offeree company as to solicitation materials, it appears that if this became an issue

the attorney must withdraw as a state attorney because the conflict would be insurmountable, even with the company's consent to proceed. The alternative would be that the offeree company not issue any solicitation materials so as to avoid that problem, and that the attorney obtain consent to the public representation under both Canons 4 and 5.

However, a more difficult situation arises as to the position of the public client of the attorney. Again, there is a question of fact as to whether or not informed consent can be obtained from each offeree shareholder. It appears that even if that consent is obtained, it would be insufficient as the act's declared purpose is protection of the state's interest as well as that of the shareholders. A prior opinion of the Committee held that "a public officer is not in a position to consent on behalf of the public body." (Utah Opinion 3). That opinion held that a special assistant attorney general handling only support and family matters on behalf of the state could not also represent private clients against the state. The opinion also referred to ABA Informal Opinion 674, wherein it was held that a law firm could not represent a client in a state tax matter when a member of the firm was a part-time member of the attorney general's staff.

The problem here is more or less the reverse. The attorney is acting for the state in only this one matter, and represents the offeree company on a continuing basis. It seems apparent that the interests of the offeree's shareholders are the object of potentially competing interests of the offeror and the offeree company. The Act declares itself to be neutral as between the offeror and the offeree company, concerned only with the public interest to be promoted through full disclosure. The attorney, acting in the public role, potentially could be affected in the pursuit of that role by the interests of his private client. The reverse is also true. The considerations set forth in Utah Opinion 3 are relevant herein and are as follows:

1. ". . . 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."
2. ". . . 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."
3. ". . . 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."
4. ". . . he might jeopardize his private client's case by virtue of information which he might divulge to his public employer."

It is the potential for abuse in abrogation of the duty owed to one client in favor of another, rather than the actuality,

which renders the dual capacity untenable. An attorney has a duty to "avoid even the appearance of impropriety" pursuant to Canon 9.

Interests of a corporation and its shareholders are not identical. Thus, as was held in Utah Opinion 56 that, "an attorney may not ethically represent some stockholders in a derivative actions against a corporation when he previously acted as corporate counsel."

As noted above, the Take-Over Disclosure Act is for the purpose of protecting offerees shareholders and the public welfare while favoring neither the offeror nor the offeree company. Indeed, the Act makes requirements of both. The situation is such that consent, were it obtainable, cannot resolve problems of conflict of interest or erosion of public confidence, and therefore, a private attorney may not act on behalf of the state to enforce the act when he also represents, on a continuing basis, the offeree company.

Rule Cited:

Canon 4 & 5