

Utah Ethics Opinions

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77. USB EAOB Opinion No. 77

Utah State Bar

Ethics Advisory Opinion No. 77

Approved January 20, 1986

Facts: Attorney (A) was employed as the (City Y) City Attorney for approximately four years. During the last months of A's tenure, A drafted a new contract for solid waste collection in (City Y). Client (C) was awarded the contract and asked A to include two additional provisions. One provision allowed C increased compensation if the price of fuel rose above a specified level. A drafted those provisions and C operated under the contract from approximately June, 1979 to December, 1979.

In June, 1979, A left his position as city attorney. In December, 1979, A represented C and successfully negotiated with the city for a rate increase under the contract. In July, 1980, A again represented C in successfully negotiating for a compensation increase, pursuant to a clause allowing an annual compensation increase based on the Bureau of Labor Statistics cost of living index for blue collar workers. A also represented C in negotiations with the city regarding late payments from customers. In July, 1982, A represented C in his request for a two-year extension of the contract which was to expire in July, 1984.

In September, 1984, A represented C in his request for an annual compensation increase pursuant to the clause A drafted during his tenure as city attorney. A's argument to the city counsel involved interpreting the intent of the contract when it was drafted. A argued that the annual compensation clause was intended to apply to both the original contract and the two-year extension. The current city attorney (X) claimed that the annual compensation clause applied only to the original contract and was not intended to cover the two-year extension. Following the city council meeting, X approached A and suggested that it may be in A's and C's best interests if A did not represent C before the city in future negotiations.

According to X, there was no objection to A representing C until the September, 1984 negotiations regarding the annual compensation increase. X's objection was that A's argument regarding the annual compensation clause entailed interpretation of the intent of that clause. Apparently, it was

unclear whether that clause applied to the two-year extension. A argued to the city council that the intent of the contract when he drafted it was that the clause would apply to the extension. X felt that A's representation of C at that point crossed into the realm of unethical conduct.

The question is whether a former city attorney may represent a client in contract negotiations with the city when the former city attorney drafted that contract during his tenure as city attorney and when the intent of one contract provision was at issue.

Opinion: DR 9-101(B) states that "a lawyer shall not accept private employment in a matter in which he had a substantial responsibility while he was a public employee."

ABA Formal Opinion 342 (F342), which interprets DR 9-101(B), outlines and defines the key words in DR 9-101(B). "Private employment", is employment as a private practitioner. "Matter" contemplates a discrete transaction or set of transactions between identifiable parties, according to F342. The same lawsuit or litigation is the same matter, whereas drafting government or agency procedures is not. "Substantial responsibility" is more difficult to interpret. The phrase contemplates the official's involvement in the matter "to an important and material degree in investigating and deliberating about the transactions or facts in question." The public employee's involvement is substantial if he had heavy responsibility and became personally involved. When interpreting DR 9-101(B), F342 states that the policies behind the rule must be weighed. On the one hand the rule should protect against: 1) switching sides; 2) disclosure of confidential government information; 3) lawyer's handling of government matters after leaving government service; and 4) the appearance of impropriety.

Countervailing policy considerations support a rule which does not broadly limit the lawyer's employment after he leaves government service. Those considerations include: 1) the ability of government to recruit competent lawyers without imposing harsh restraints on their future practice; 2) the need to prevent litigants from using the rule as a mere tool to deprive his opponent of competent counsel; and 3) the need to prevent the rule from unnecessarily interfering with the public's right to choose a competent lawyer who has specific expertise or knowledge.

Several Utah Opinions have also interpreted DR 9-101(B). Utah Opinion 6 stated that a city attorney whose position involves prosecutions may not defend those charged with misdemeanors and criminal offenses in other jurisdictions unless the attorney is assigned to do so. Utah Opinion 10, approved in 1972 modified Utah Opinion 6 and allowed and

exception for sparsely populated areas. Utah Opinion 37 states that an attorney may not represent a client before the county commission or defend a client in an alleged misdemeanor violation of a county ordinance when the attorney's partner is a deputy county attorney. That opinion also stated that 25-30 miles does not seem an unreasonable distance to travel to engage counsel.

Under the facts presented, A has violated DR 9-101(B) by representing C against the city and by asserting the intent of the contract when it was drafted. A clearly acted as a private practitioner by representing C and therefore fulfilled the "private employment" portion of DR 9-101(B). In addition, the matter involved in C's contract with the city is the same transaction which was part of A's prior duties as city attorney. A had drafted the contract for the city in 1979. Then, in 1984 A argued that his intent in drafting that contract was that the annual compensation clause would apply annually to the original contract and to the two-year extension. Clearly, the same transaction was involved in the 1984 negotiation.

The central question is whether A had a substantial responsibility within the meaning of DR 9-101(B) when he represented C before the city council in September, 1984. Appearance of impropriety is not the test according to F342. The test is whether A had such a heavy responsibility for the matter in question that it is likely he became personally and substantially involved in the investigative or deliberative processes regarding the matter.

In this case A, in effect switched sides by representing C against the city in a matter he was heavily involved in as city attorney. A used his knowledge from his previous government job to benefit a new and adverse client. A argued that the annual compensation clause when it was drafted was intended to apply every year, including the two-year extension period. The current city attorney contended that the city council did not intend to allow annual compensation increases during the two-year extension. One of the three city council members was not on the council at the time the contract was approved. The other two were split regarding the intent of the contract clause. One could not remember the intent of the clause and the other agreed with A's argument. As a result, the clause was found ambiguous, construed against the drafter and A's client was allowed an annual compensation increase. By drafting the contract for the city and later using the contract for a private client, A used his substantial responsibility as a government employee to the benefit of that private client. A not only switched sides, but also violated some of the other policies behind DR 9-101(B). To the public, A's conduct may have appeared improper. Also, if such conduct is allowed by government lawyers, lawyers may handle government matters in order to obtain future employment in those matters. These concerns outweigh the countervailing

considerations of allowing the government to recruit competent lawyers without imposing harsh restraints on their practice and of preventing litigants from using DR 9-101(B) as a mere tool to disqualify competent counsel. In this case, the city attorney allowed A to represent C until A began to argue the intent of the contract he had drafted. C was not deprived of counsel up until that time. Further this opinion does not pass on A's representation of C from 1979-83. Rather A should be cautioned to use care in representing clients before government entities that formerly employed him.

A has also stated that in City Y there are few lawyers, and if DR 9-101(B) is to apply in such a small town, it will significantly impact City Y lawyers practice. Utah Opinion 37 states that 25-30 miles does not seem an unreasonable distance to travel to engage counsel. Similarly, in this case, C could have traveled about 35 miles to obtain representation in a major Utah city.

From the facts presented, A is disqualified from representing C before the city counsel under DR 9-101(B).

Rule Cited:

DR9-101(b)