

## Utah Ethics Opinions

1995.

95-03. USB EAOB Opinion No. 95-03

Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 95-03

Approved April 28, 1995

**Issue:** Is a private attorney who is a part-time city prosecutor for a city on a contract basis precluded from representing a defendant in a civil contempt proceeding?

**Opinion:** No. A city attorney with prosecutorial functions may represent a defendant in a civil contempt proceeding, provided the city is not a party to the proceeding.

**Analysis:** The Committee has previously addressed the issue of potential conflicts when a part-time or contract city attorney wishes to represent defendants in criminal cases in Ethics Advisory Opinion No. 126. (fn1) The analysis of that opinion provides a foundation for the civil-contempt question.

In Opinion No. 126, the Committee determined that:

(1) A city attorney with prosecutorial functions may not represent a criminal defendant in any jurisdiction;

(2) A city attorney with no prosecutorial functions, who has been appointed as city attorney by statute, may not represent a criminal defense client in that city, but may represent a criminal defense client in other jurisdictions, provided that Rule 1.7(a) of the Utah Rules of Professional Conduct is satisfied;

(3) A city attorney with no prosecutorial functions, who is retained by a city on a contract or retainer basis, may represent a criminal defense client in any jurisdiction, provided that Rule 1.7(a) is satisfied; and

(4) An attorney who is a partner or associate of a city attorney may not represent a criminal defense client in any situation where the city attorney is so prohibited.

Although jail sentences are ordinarily associated with criminal proceedings, contempt sentences handed down by judges in civil cases do not carry the characteristics of a criminal prosecution in which lawyers representing a state or local government are involved. The Committee believes

that the restrictions imposed by Opinion No. 126 do not apply in the civil context. The reasoning set out in Opinion No. 126 dealt with conflicts of interest in the nature of the attorney's representation of persons whom he is by law obligated to prosecute. In addition, Opinion No. 126 reiterated the concerns of the Utah Supreme Court in *State v. Brown* (fn2) to the effect that the attorney's client in such situations may be reluctant to confide fully in counsel known to be a prosecutor and that such representation would undermine the public's confidence in the integrity of the criminal justice system.

None of those concerns exist in the situation of a civil matter, even if the attorney's client stands the chance of being held in civil contempt and serving some jail time as a result. In general, civil contempt involves the disobedience to a court's order in the course of a civil proceeding. There would, for example, be no chance that the attorney would be placed in the position of having to argue the unconstitutionality of a law he is, as the city's attorney, obligated to enforce, nor would there be the concern that he would not be motivated to cross-examine police witnesses vigorously since police officers would likely not be involved as witnesses in civil contempt proceedings. In short, the public policy concerns expressed by the Utah Supreme Court in *State v. Brown* and by this Committee in Opinion No. 126 are not involved in civil proceedings. Furthermore, there is no evident conflict under Rule 1.7 (fn3) arising from a city attorney's representation of a private client in a civil contempt proceeding-provided neither the city nor any other client of the attorney is a party to the civil proceeding.

**Conclusion:** A part-time or contract city attorney with prosecutorial functions is not disqualified under Rule 1.7 or Opinion No. 126 from representing a private client who is a defendant in a civil contempt proceeding, provided the city is not a party to the proceeding.

### Footnotes

1. 1994 WL 579846 (Jan. 27, 1994).
2. 853 P.2d 851 (Utah 1992).
3. Utah Rules of Profession Conduct 1.7.

### Rule Cited:

1.7