

Utah Ethics Opinions

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Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 98-02

Approved April 17, 1998

Issue: May an attorney represent both a county and a city that lies within the jurisdiction of the county as to civil matters?

Opinion: The Utah Rules of Professional Conduct do not require a blanket prohibition of an attorney's representation of both a city and county on civil matters. This general conclusion is, in part, in conflict with Utah Ethics Advisory Opinion No. 81, which is accordingly overruled in part. In the event the two entities are directly in conflict as to a particular matter, however, the attorney may not represent both (and perhaps neither) of the parties in that matter or other matters, unless the attorney can comply with the provisions of Rule 1.7(a). Similarly, in some circumstances the attorney may be unable to represent one or both entities under Rule 1.7(b).

Analysis: Utah Ethics Advisory Opinion No. 81 holds categorically that an attorney cannot simultaneously represent the civil interests of a county and city within the county's jurisdiction. That opinion was issued in 1987, prior to the adoption of the current Rules of Professional Conduct and is based on concerns of divided loyalties, improper use of confidential information, and the appearance of impropriety. The current Rules of Professional Conduct no longer require such a blanket prohibition.

Utah Rule of Professional Conduct 1.7 establishes the ethical bounds of representation in conflict-of-interest situations. (fn1) When the city and county are directly adverse to each other, such as in negotiating or preparing a contract between the two entities, Rule 1.7(a) prohibits the attorney from representing either, unless the attorney reasonably believes it will not adversely affect either client and unless each client consents. While we do not decide who is capable of giving consent on behalf of a governmental entity, both the city and county may consent to the attorney's representation of one or both of them. We also note that Rule 2.2 specifically contemplates the situation where the attorney acts as an intermediary

between two parties, (fn2) but only if Rule 1.7 is satisfied. If, however, the attorney is not comfortable with representing either or both under the circumstances, or if the attorney is unable to consult adequately with either party in order to get consent due to Rule 1.6 confidentiality-of-information issues, the attorney must withdraw from representation in that matter.

Similarly, Rule 1.7(c) prohibits an attorney from representing the city or county in a matter when those two entities are adverse to each other in a separate matter. (fn3) So, for example, if th(a)e city and county are negotiating a contract between them and have hired separate counsel because of the Rule 1.7 conflict, the city/county attorney may not be able to represent either the city or the county and, perhaps, neither of them-in *any* other matter until the contract is resolved. Again, however, if the attorney believes the representation will not be affected, and if both clients consent to the representation of one or both of them, the attorney may proceed consistent with the consent. If not, the attorney must withdraw until the matter on which the two entities are in direct conflict is resolved.

Finally, Rule 1.7(b) prohibits representation where the attorney's representation of another client may interfere. Can a city attorney adequately represent both the city's civil interests and the county's civil interests, or vice versa, where there is no directly adverse conflict? The comment to the rule states that no categorical rule can apply:

A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. (fn4)

The question of whether the attorney can adequately represent either entity in the absence of a direct conflict may involve the confidentiality provisions of Rule 1.6. If the attorney cannot rightfully consider alternatives because of the restrictions of Rule 1.6, the attorney's professional judgment may well be impaired and representation cannot continue. For this and for other case-specific reasons, the city/county attorney may decide the potential for conflict will impair representation and should withdraw in that particular matter.

In addition to addressing representation in civil actions, Opinion No. 81 holds that an attorney may perform prosecutorial services for both the county and a city within its jurisdiction. That holding is not inconsistent with this

opinion and is still valid. (fn5)

Finally, while our opinions have stated that an attorney cannot prosecute for a city and defend criminal matters in any other jurisdiction in Utah, we can find no reason categorically to prohibit an attorney from representing a city or county on criminal or civil matters while maintaining a separate civil practice. Rules 1.7 and 1.9 and other Utah Ethics Advisory Opinions adequately cover possible conflicts that may arise. (fn6)

Footnotes

1. The full text of Rule 1.7 is found in the Appendix to the Opinion.

2. The full text of Rule 2.2 is found in the Appendix to the Opinion.

3. The ABA Model Rules of Professional Conduct do not contain a provision like Utah Rule 1.7(c). We have reviewed the history of the adoption of the Utah Rules of Professional Conduct and can find no explanation for the addition of this paragraph. Nor do the official Comments to Rule 1.7 explain the role or need for Rule 1.7(c) vis-à-vis Rule 1.7(a). We have previously resolved questions that might have been addressed by Rule 1.7(c) by applying Rule 1.7(a). *See, e.g.*, Utah Ethics Adv. Op. 126, n.2, 1994 WL 579846. The facts in this case, however, appear to fall within the literal wording of Rule 1.7(c).

4. Utah Rules of Professional Conduct 1.7, cmt., "Loyalty to a Client."

5. Nevertheless, there may be fact-specific circumstances that would require the attorney to withdraw from certain prosecutorial representation. By generally upholding the dual prosecutorial aspects of Opinion No. 81, we did not intend to provide blanket authorization for a prosecuting attorney to represent both county and an included city in every possible circumstance.

6. *See, e.g.*, Utah Ethics Advisory Op. 99, 1989 WL 509365 (attorney who serves as part-time city or county attorney is barred from representing a defendant in a civil action brought in the county by the state of Utah to collect delinquent child support payments); Utah Ethics Advisory Op. 95-03, 1995 WL 283826 (city attorney with prosecutorial functions may represent a defendant in a civil contempt proceeding, provided the city is not a party to the proceeding); Utah Ethics Advisory Op. 98-01, 1998 WL 32436 (prosecuting attorney acting as a private practitioner must avoid engaging in a civil action that involves parties and facts that have been or become the subject of criminal investigation within the prosecutor's

APPENDIX

Utah Rules of Professional Conduct 1.7. Conflict of Interest: General Rule.

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) Each client consents after consultation

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless:

(1) The lawyer reasonably believes the representation will not be adversely affected; and

(2) Each client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation to each client of the implications of the common representation and the advantages and risks involved.

(c) A lawyer shall not simultaneously represent the interests of adverse parties in separate matters, unless:

(1) The lawyer reasonably believes the representation of each will not be adversely affected; and

(2) Each client consents after consultation.

Utah Rules of Professional Conduct 2.2. Intermediary.

(a) A lawyer may act as intermediary between clients if:

(1) The lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect of the attorney-client privileges, and obtains each client's consent to the common representation; and

(2) The lawyer reasonably believes that the matter can be resolved on terms compatible with the client's best interest, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) The lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to

any of the clients; and

(4) All requirements of Rules 1.7 and 1.8 are met.

Rule Cited:

1.7