

Utah Ethics Opinions

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Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 99-06

Approved August 27, 1999

Issue: As a part of a criminal plea bargain agreement in a DUI case, may either the prosecuting attorney or the defense lawyer seek the concurrence of the investigating police officer not to respond to a subpoena lawfully issued by the Utah Driver License Division in connection with the related driver-license revocation hearing, a state administrative proceeding?

Opinion: No. Such conduct violates Rule 3.4(a) and 8.4 of the Utah Rules of Professional Conduct.

Facts: In cases involving operation of a motor vehicle while under the influence of alcohol ("DUI"), two actions are initiated. The first is the criminal DUI action. The second is an administrative hearing before the Driver License Division of the Utah Department of Public Safety ("DLD") to consider whether to revoke or suspend the defendant's driver license (the "DLD hearing").

In connection with the DLD hearing, the investigating police officer is served with a subpoena to appear at that hearing. Before the DLD hearing takes place, the defendant's lawyer and the prosecuting attorney (fn1) agree to resolve the criminal DUI action. As a part of the plea-bargain discussion or after the agreement is reached, but before the DLD hearing, either the defendant's lawyer or the prosecuting attorney contacts the investigating officer to indicate that (1) a compromise or a "deal" has been worked out concerning the charge against the defendant, and (2) a part of the deal is that the police officer will not appear at the DLD hearing. Notwithstanding the issued subpoena, non-appearance forecloses the presentation of any evidence against the defendant at the DLD hearing and is tantamount to "saving" the defendant's license from being suspended or revoked. As a result of the investigating officer's non-appearance at the DLD hearing, the administrative action is dismissed, and no action is taken relating the defendant's driver's license.

Analysis: Section 76-8-508 of the Utah Code provides:

A person is guilty of a third degree felony if, believing that an official proceeding or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a person to . . . (b) withhold any testimony, information, document, item; (c) elude legal process summoning him to provide evidence; or (d) absent himself from any proceeding or investigation to which he has been summoned. (fn2)

On the facts related to the Committee in this request, a major element of the overall plea-bargain arrangement is the agreement that the subpoenaed police officer will not testify or, at least, will be asked to concur with the "deal" and not respond to the DLD subpoena. In the process of striking such a plea bargain on the DUI charge, if either the defense lawyer or the prosecuting attorney has induced (or attempted to induce) the police officer not to respond to a validly issued subpoena to appear at the DLD hearing, that lawyer appears to be in violation of Utah law.

Rule 8.4 of the Utah Rules of Professional Conduct specifies when a violation of the law constitutes an ethical transgression: "It is professional misconduct for a lawyer to . . . [c]ommit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects" (fn3) or to "engage in conduct that is prejudicial to the administration of justice." (fn4)

Accordingly, we find that a lawyer who encourages or influences an investigating officer to ignore or fail to respond to a lawfully issued subpoena violates Rule 8.4 on two counts: (1) To encourage a witness who has been subpoenaed not to appear at a DLD hearing is to interfere with, and be prejudicial to, the administration of justice. (2) Further, to do so is a criminal act under Utah Code Ann. § 76-8-508 and one that may reflect directly on the lawyer's regard and respect for the legal system that he serves. Engaging in an arrangement that has the ultimate effect of inducing a witness to ignore or fail to honor a subpoena would ordinarily reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer. However, it appears that this practice has occurred frequently over time, apparently in an attempt to expedite the judicial process. Because the ethical issues may not have been fully appreciated in the past, we do not recommend that any action be initiated by the Office of Professional Conduct in connection with past actions. However, any future action of this type would, in the Committee's view, be a violation of Rule 8.4.

In addition, this arrangement violates Utah Rule of Professional Conduct 3.4(a): "A lawyer shall not . . . unlawfully obstruct another party's access to evidence or unlawfully alter, destroy a document or other material

having potential evidentiary value." An annotation to the ABA Model Rules of Professional Conduct concludes that "[p]rocur[ing] the absence of a witness would . . . constitute the obstruction of evidence in violation of Rule 3.4(a)." (fn5)

The fact that this practice may have become commonplace, ostensibly in the pursuit of efficient processing of "routine" DUI cases, does not, of course, relieve the lawyers involved from compliance with the Rules of Professional Conduct. If compliance with the rules produces fewer plea bargains and more trials and administrative hearings, the state court system or the state legislature may wish to fashion a remedy. It is not for the lawyers to make such judgments.

Our Opinion will not, as some might claim, cause the wheels of practical justice to slow to a crawl. An ethically permissible way to proceed is to engage directly both arms of the State's law-enforcement system—criminal and administrative—by involving the appropriate personnel of the DLD. If the State's "deal" is that the defendant will plead guilty to a specified criminal charge in exchange for preservation of the defendant's license and dismissal of the revocation proceeding, then let the State of Utah, through the coordination of its criminal and administrative arms, effect such a result. It should not be necessary to bend the ethical rules or to put law-enforcement officers in the position of purposefully failing to respond to a lawfully issued subpoena from an agency of the State of Utah.

Footnotes

1. As related to the Committee, this agreement may not even involve a prosecuting attorney, but constitutes an arrangement worked out between the defense lawyer and the police officer. As we have not been provided any facts about the nature of the communications that may have taken place before the plea-bargain arrangement has been worked out, we do not examine the ethical considerations of the bargaining process.

2. Utah Code Ann. § 76-8-508(1) (1998).

3. Utah Rules of Professional Conduct 8.4(b).

4. *Id.* 8.4(d).

5. *Annotated Model Rules of Professional Conduct* 328 (ABA 3d ed. 1996), citing *Barnhill v. United States*, No. 589-286, 1992 WL 453880 (N.D. Ill. April 8, 1992) (government lawyer counseled witness not to appear). *See also* Charles W. Wolfram, *Modern Legal Ethics*, 646 & n.80 (Hornbook Series 1986).

Rules Cited: