

Ethics Advisory Opinion Committee
Opinion No. 20-02
Issued: May 19, 2020

ISSUE

1. What ethical duties apply to prosecutors and defense lawyers when dealing with victims in domestic violence criminal cases?

OPINION

2. All counsel must be mindful of the conflicts of interest rules when dealing with victims of domestic violence cases. Representation of a criminal defendant in a criminal case precludes representation of the alleged victim in the same case. Both prosecutor and defense counsel must be mindful of the rules relating to communications with represented or with unrepresented parties. Neither prosecutors nor defense counsel may discuss the matter with a represented victim without permission of the victim's counsel. Neither prosecutor nor defense counsel may give the unrepresented victim advice, other than the advice to obtain independent counsel and referrals or information as to how to do so.

BACKGROUND

3. The Ethics Advisory Opinion Committee (the “EAOC”) has been approached by a representative of an association of lawyers engaged in the prosecution of domestic violence cases. The association submitted a list of questions specific to the handling of domestic violence cases.¹ The EAOC chooses not to specifically respond to those questions as posed but rather reminds all lawyers of the tools available to assess proper professional conduct in a variety of settings.

¹ Some of the questions posed in the request require analysis of substantive law—a task not delegated to the EAOC. We only note that in domestic violence cases, like all lawyers, a lawyer has a duty of competence under Rule 1.1 of the Utah Rules of Professional Conduct.

ANALYSIS

4. The Utah Rules of Professional Conduct apply to all lawyers regardless of specialty or specific case. The Utah Rules of Professional Conduct apply in difficult as well as easily recognized situations. Indeed, paragraph nine of the Preamble to the Utah Rules of Professional Conduct provides: “Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.”

5. Whether a person is or is not a client of a lawyer is a foundational question in the law of lawyering. *See* “The Law of Lawyering,” Hazard, Hodes and Jarvis 2019 Supplement Section 2.7. The Utah Rules of Professional Conduct do not define the identity of the client. Rather, attorney-client relationships are established by other law governing contractual and other relationships. Nevertheless, “a client lawyer relationship arises when a person manifests an intention to receive legal services from a lawyer, and the lawyer then either agrees to provide the services or fails to negate consent where the prospective client has reasonably assumed that the relationship is under way.” *Id.* The lawyer has the responsibility to clarify whom the lawyer represents and the scope of that representation.

6. Sometimes the determination of the client is not controversial. For example, in domestic violence questions, it is always clear that the prosecutor represents the government. Similarly, the defense attorney’s client is the defendant, and only the defendant. Having identified the respective client of each lawyer, neither the prosecutor nor the defense lawyer may conduct herself in such a way as to give the impression, much less affirmatively tell the alleged

victim, that she represents anyone other than her own client. Rule 1.7 of the Utah Rules of Professional Conduct is quite clear in regard to conflicts of that nature.

7. The alleged victim is not the client of the defense lawyer. Rule 1.7(a)(1) of the Utah Rules of Professional Conduct precludes concurrent representation of clients with conflicting interests. Defending a person accused of a crime while at the same time representing the person whom the government has labelled as the victim of the defendant's crime presents the kind of conflict to which Rule 1.7(a)(1) of the Utah Rules of Professional Conduct is squarely addressed.

8. Likewise, a prosecutor should make plain that she represents the state and not the "victim," as the interests of the state in prosecuting domestic abusers may not coincide with the interests and desires of the victim in any particular case. Where prosecutors' offices employ staff to act as victim liaisons, it is equally important that the liaisons similarly make plain that the prosecutor's office employs them and that they do not have solely the victim's interests in mind.

9. Having determined that the victim is the client of neither the defense lawyer nor the prosecutor, other Rules apply. For example, if the alleged victim is unrepresented, the provisions of Rule 4.3 of the Utah Rules of Professional Conduct apply equally to prosecutors and defense lawyers. Neither lawyer shall state or imply that the lawyer is disinterested. Because each lawyer knows or reasonably should know that the interests of the alleged victim are or have a reasonable possibility of being in conflict with the interests of either the government or the defendant, neither the defense lawyer nor the prosecutor should give legal advice to an unrepresented party (*see* Rule 4.3(a) of the Utah Rules of Professional Conduct), other than the advice to seek legal counsel. Regardless of the temptation to structure the case through proposals that the alleged victim testify or not testify, the duty of prosecutors and defense attorneys is to

refrain from giving legal advice to the victim, whether or not the victim is represented. Thus, it would be improper for a defendant's lawyer to propose that an alleged victim decline to testify or not attend the trial in order that the matter be dismissed. Similarly, it would be improper for a prosecutor to give legal advice that would force or coerce a reluctant victim to testify. However, defense counsel or prosecutor may provide referrals for the victim to obtain counsel – including referrals to the Utah Crime Victims Legal Clinic or other legal advice clinics.

10. If the alleged victim is represented by counsel, both prosecutors and defense lawyers must comply with Rule 4.2 of the Utah Rules of Professional Conduct which precludes communication about the subject of the representation with a person known to be represented without permission of that person's counsel. In accordance with Rule 4.2(c), limitations on the prosecutor's ability to speak with the represented party are not absolute.

11. The Utah Rules of Professional Conduct relating to representation of a client include Rule 1.1 (Competence) and Rule 1.3 (Diligence). Rule 1.1 and Rule 1.3 apply to all lawyers. In proper representation of a domestic violence defendant, the defense lawyer must learn of the evidence which will be presented against her client and properly evaluate the strength of the evidence and any possible mitigating circumstances. In some cases, this will require the lawyer to interview the alleged victim, if possible. Likewise, in exercising competence and diligence, the prosecutor or his representatives must do that which is necessary to be adequately prepared for trial, which may require an interview of the alleged victim. In performing those interviews both prosecutors and defense lawyers need to be cognizant of the rights of the alleged victim, as well as the risks associated with interviewing a complaining witness, *e.g.*, subsequent claims of intimidation or suggestion of subornation of perjury.

CONCLUSION

12. Though difficulties may arise in the practice of law, all lawyers must comply with the Utah Rules of Professional Conduct. Both prosecutors and defense lawyers have equal duties to respect the rights of the alleged victim.