

Utah Ethics Opinions

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Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 98-01

Approved January 23, 1998

Issue: May an elected county attorney or other prosecutor who is allowed to engage in private practice continue to act as attorney in a civil matter in which the opposing party in the civil matter commits a crime or otherwise comes under suspicion as a potential criminal defendant in that county? Is it enough that the prosecutor refers any criminal matter involving the opposing litigant to another prosecutor, or must the attorney withdraw from both matters?

Opinion: As a general rule, a Utah prosecuting attorney acting as a private practitioner should 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 jurisdiction. Provided the attorney has not become personally substantially involved in and has no meaningful control over any investigation of the criminal matter, the attorney already involved in civil litigation need not withdraw from the civil matter and can avoid inherent conflicts by referring the criminal matter to an appropriate conflicts attorney.

Analysis: The Utah Rules of Professional Conduct do not expressly address the obligations of attorneys in public office or of public prosecutors where potential conflicts of interest may arise from simultaneous private civil practice. The question posed to the Committee supposes that the prosecutor at all times is "adverse" to the opposing party, both in the civil as well as the potential criminal matter. This situation is therefore governed by Rule 1.7(b) of the Rules of Professional Conduct, which prohibits representation of one client if the representation may be materially limited by the attorney's responsibilities to another client or to a third person. As the Comment to Rule 1.7 sets forth, the rule applies not only where there is actual, immediate conflict between the interests involved, but wherever there exists "the likelihood that a conflict will eventuate [which] 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."

In evaluating the possible likelihood for conflict in this regard, the Committee joins in the opinion expressed by the majority of courts and others who have opined:

We can extend [the general rule's] prohibition beyond cases of actual present conflict to those in which the interests may with some reasonable degree of probability become conflicting. Even the possibility of conflict should deter a lawyer in public office from engaging in a civil action involving parties and facts which have been the subject of previous criminal investigation, as later developments may indicate, notwithstanding previous decision to the contrary, that criminal action should be taken. (fn1)

This general caution can logically be extended to ongoing litigation during which an opposing party becomes the subject of criminal investigation:

A lawyer should not be permitted to accept other or subsequent employment in a matter which may conflict with the interest covered by his professional obligation or which may be adverse to interests which are closely related to the law and facts involved in a matter which he has previously handled. The attempted double role is fraught with many conceivable inconsistencies and antagonisms. Public duty and fealty to private client, involving subordination of the interest of one or the other, may embarrassingly challenge the conscience of the lawyer who attempts to serve both. (fn2)

As various courts have recognized, a prosecuting attorney "holds an office of unusual responsibility, and he must exercise his duties with complete impartiality." (fn3) The American Bar Association describe the prosecutor's role in more specific terms, declaring that "[t]he prosecutor is both an administrator of justice and an advocate; he must exercise sound discretion in the performance of his functions." (fn4) In Utah as in other jurisdictions, the prosecutor enjoys discretion in choosing which cases to pursue, what crimes to charge, and how to allocate governmental and police resources in investigative roles. (fn5)

Many commentators have recognized the concomitant ethical standards that must accompany the discretion vested in the public prosecutor's function:

Our society can tolerate a system that allows such an accretion of power [vested in a prosecutor] despite the limited ability to review the decision-making process because we charge the district attorney or prosecuting

attorney with a high ethical standard. That standard- the exercise of his "judicial capacity"- is breached not only by actual conflict of interest, but also by actions which have the appearance of conflict of interest. (fn6)

An attempt to act simultaneously in both a civil and a criminal capacity with respect to the same litigant is usually too difficult a situation to avoid impermissible conflicts. As one jurist reasons:

[I]n [such a] case, neither [the Court] nor the [accused] can know how or if the district attorney's decision to prosecute was influenced by his representation of the victim in a civil suit. The situation is too ripe, however, with potential abuse: an attorney would be hard pressed to abandon prosecution of a defendant when a criminal conviction would be proof of the alleged tort in the civil suit; the attorney would be free to use public resources to rout out additional evidence against the criminal defendant, a pursuit based not necessarily on the prosecutor's view of the social importance of the case, but solely on the private interest which he and his client have in the case. A defendant does not have a right not to be prosecuted; he does, however, have a right to have his case reviewed by an administrator of justice with his mind on the public purpose, not by an advocate whose judgment may be blurred by subjective reasons. (fn7)

For all these reasons, the Committee believes that, where a prosecutor is already engaged in representing a private party in civil litigation and the opposing party becomes the subject of criminal investigation or possible prosecution within the prosecutor's jurisdiction, it is sufficient that the prosecutor recuse himself from the criminal matter and withdraw from any involvement in the investigation or prosecution of that litigant. In withdrawing from the criminal matter, the limitations and requirements of Rule 1.10 of the Rules of Professional Conduct, describing imputed disqualifications among attorneys associated in a firm, must also be strictly followed.

Further, to the extent that the prosecutor may have already become substantially personally involved in any material stage of the criminal investigation or prosecution, or if the prosecutor has or may exercise control over the prosecutorial function and decisions relating to the suspect, then withdrawal from both matters would be required.

Finally, the Committee specifically notes, as have courts and commentators generally, that the question posed here turns solely on the ethical guidelines for appropriate attorney behavior. These rules are not necessarily the same rules for determining misconduct in a trial setting or in determining whether any given potential conflict may adversely affect the rights of an accused in any proceeding.

(fn8)

Footnotes

1. ABA Comm. On Ethics and Professional Responsibility, Formal Op. 135 (1935).

2. ABA Comm. On Ethics and Professional Responsibility, Formal Op. 128 (1935).

3. *Commonwealth v. Wiggins*, 328 A.2d 520, 522 (Pa. Superior Ct. 1974).

4. ABA Standards for Criminal Justice, Standards Relating to the Prosecution Function § 1.1(b).

5. See *United States v. Cox*, 342 F. 2d 167 (5th Cir. 1965); Brietel, Controls in Criminal Law Enforcement, 27 U. Chi. L. Rev. 427 (1960). There does not appear to be any exception to the general rule and principles discussed here based on the relative "seriousness" of the crime with which a defendant may be charged. Whenever a prosecutor is called upon to exercise prosecutorial discretion, the potential for conflicts from dual representation will arise.

6. *Commonwealth v. Dunlap*, 335 A.2d 364 (Pa. Superior Ct. 1975) (Hoffman, J., dissenting).

7. *Id.*

8. See, e.g., ABA Standards for Criminal Justice § 1.1 ("these standards are intended as guides for the conduct of lawyers and as the basis for disciplinary action, not as criteria for the judicial evaluation of prosecutorial misconduct to determine the validity of a conviction.")

Rule Cited:

1.7(b)