

Utah Ethics Opinions

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06-01. UTAH STATE BAR ETHICS ADVISORY OPINION COMMITTEE

Opinion No. 06-01

June 2, 2006

Issue: May members of the County Attorney's Office provide pro bono legal assistance to victims of domestic violence in seeking civil protective orders?

If so, is it thereafter permissible for the County Attorney's Office to prosecute the subsequent violation of the protective order?

Would it be permissible for the County Attorney's Office to provide such legal assistance to victims of domestic violence as a governmental service and thereafter prosecute subsequent violations of the protective order if the civil division of the office assisted in the civil protective order and the criminal division in any subsequent prosecution?

Opinion: While statute, ordinance or employment contract may prohibit a government lawyer from representing individuals on a pro bono basis, the only ethical prohibition would arise from conflicts of interest provisions. Conflicts of interest rules would not prohibit the initial private representation but would prohibit the individual government lawyer from thereafter having any involvement in the prosecution of the abuser. It is conceivable that the pro bono work of one government lawyer in a large office with different divisions would have no impact upon another government lawyer in a different division handling a related matter for the government. However, it would be improper for the second lawyer to undertake to represent the governmental entity if the pro bono work undertaken by the first lawyer could create a material limitation for that second lawyer. Finally, two separate divisions of a governmental office can be established to undertake potentially conflicting work, provided that attorneys in one unit do not in any way "participate" in the work of the other unit (best achieved through "screening") and provided that any representation of an individual or non-governmental entity fully complies with Rule 1.8(f).

Facts: The County Attorney's Office seeks to help victims of domestic violence obtain protective orders in civil cohabitant abuse actions, since such individuals may be deterred from obtaining this protection without legal representation. The County Attorney seeks to provide full

representation, including appearing in court on behalf of the victim, not merely to provide information sufficient to permit the victim to proceed pro se. 1 The County Attorney's Office, however, does not wish to provide this assistance at the expense of being able to prosecute the abuser, either for the initial incident or for future incidents, including incidents that are violations of the order. The County Attorney's Office asks about the possibility of one attorney providing this representation "pro bono" and about the possibility of a division of the Office providing this representation as part of its regular public service. Both scenarios are addressed here.

Authority: The questions must be answered in light of the Utah Rules of Professional Conduct (2005) and EAOC Opinions:

Rule 1.7 regarding concurrent conflicts of interest (actual and potential) of the attorney

Rule 1.9 regarding successive conflicts of interest of the individual attorney

Rule 1.11 regarding conflicts of interest for government lawyers

Opinion No. 98-01

Opinion No. 01-06A

Analysis:

Applicable Rules

Rule 1.7 provides in relevant part:

. . . A lawyer shall not represent a client if . . . There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or . . . by a personal interest of the lawyer.

Rule 1.9 provides in relevant part:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent. . . .

Rule 1.11 provides in relevant part:

(d) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee:

(d)(1) is subject to Rules 1.7 and 1.9 and

(d)(2) shall not

(d)(2)(I) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing.

County Attorney Undertaking Private Pro Bono Representation

This Committee has previously addressed similar questions of conflicts of interest as they apply to an individual part-time county attorney who also maintains a part-time private practice. 2 To the extent that the County Attorney's office contemplates permitting one of its attorney employees to occasionally engage in pro bono work for private clients, we rely upon these prior opinions. 3

Our prior Opinions largely answer the first two questions. Opinion No. 01-06A (issued June 12, 2002) and Opinion No. 98-01 both address the conflicts involved when a part-time county attorney undertakes private representation in a civil cohabitant abuse action. Opinion No. 01-06A concluded that a part-time county attorney is not prohibited from representing a defendant in a civil protective order case, but if a criminal case arises out of the initial incident or is brought for violation of the protective order, that individual county attorney may not represent the defendant client or the county in such a case. 4 Opinion No. 98-01 considered the situation in which the part-time county attorney represents the victim/plaintiff in a cohabitant abuse action. There, if a subsequent criminal case is filed against the opponent/respondent, that individual part-time county attorney need not withdraw from representing the victim/plaintiff in the civil action but cannot be involved in the prosecution and must refer it to an appropriate conflict attorney. The Committee reasoned that because the interests of the victim-client and the county might diverge, the attorney may have confidential information from the private client, and the prosecutor's neutrality might be compromised by his private representation; it would be unethical for the part-time county attorney to be involved in the prosecution of this matter. 5

Thus, an individual county attorney may, under the rules of professional conduct, provide pro bono legal assistance to victims of domestic violence in seeking civil protective orders. However after the county attorney has done so he may not be involved in the prosecution of the perpetrator for the initial act or for a subsequent violation of the protective order. And he may only continue the pro bono representation if he is fully able to comply with Rule 1.7(a) where his personal interest in his paid work for the County

does not create a material limitation.

Our prior Opinions have further established that the part-time county attorney must, at the outset, fully inform the client of potential conflicts and the need to withdraw if actual conflicts arise. Moreover if the possibility of a conflict arising is likely and if that possibility will materially interfere with the lawyer's representation, the lawyer should not undertake the case initially.

Imputation of Conflicts of Interest to Other Attorneys in County Attorney Office

The second issue is whether the conflict of one county attorney undertaking individual pro bono representation is attributed to others in the office.

In the past some have looked to Rule 1.10 to indicate when conflicts of interest are imputed to others within a governmental law office. However, in November, 2005 the Utah Supreme Court adopted revised versions of Rules 1.10 and 1.11 which now make clear that Rule 1.10 is not intended to and does not apply to impute conflicts of interest within a government law office. 6 Instead, solely Rule 1.11 governs any imputation of conflicts of interest for government lawyers 7 unless the Rules expressly provide otherwise. 8

Rule 1.11(d) expressly deals with conflicts of interest for the current government lawyer and provides that the government lawyer "shall not participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment. . . ." As comment [2] to Rule 1.11 states, "paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers." Hazard and Hodes likewise note:

Because governmental lawyers in the same government agency are not subject to the imputation rule, the legal work of the government may go forward whether or not other affected parties consent, and whether or not the personally disqualified lawyer is screened in the normal sense. HAZARD AND HODES, THE LAW OF LAWYERING § 15.2

Rule 1.11(d) does not require disqualification of anyone except the affected government lawyer individual. Accordingly, there is no reason for this paragraph to advert to screening and it does not. However . . . the lawyer is required to avoid 'participating' in the matters in question. This could imply that isolating the lawyer from the office's work in the matter - a form of screening - is required after

all . . . One important reason to screen government lawyers . . . is to avoid a motion to disqualify the entire government office or "firm." HAZARD AND HODES, THE LAW OF LAWYERING § 15.9

Similarly, the amendments make clear that Rule 1.11 applies to concurrent representation by government lawyers as well as successive representation. The name of the rule was changed from "Successive Government and Private Employment" to "Special Conflicts of Interest for Former and Current Government Officers and Employees." Likewise, comment [9] and expert commentary clarify that it should apply to concurrent representation as well. Hazard and Hodes explain that Rule 1.11(d) applies when a government lawyer has a concurrent conflict:

Paragraph (d) controls situations in which a lawyer is currently serving the government. . . A government lawyer might have competing responsibilities to others that could materially limit representation of the government. For example, it is not unheard of for lawyers representing state and local government units to be representing other clients with conflicting interests while also representing the government. HAZARD AND HODES, THE LAW OF LAWYERING § 15.2

Rule 1.11 has been looked to when considering concurrent conflicts of interest of government lawyers given "the policy and practical reasoning behind the rule." See Vermont Ethics Opinion No. 2003-04 at www.vtbar.org (addressing part-time assistant attorney general who also serves "of counsel" at a law firm).

For these reasons we conclude that the pro bono work of one government lawyer will not create a conflict of interest that will be imputed to others in the government office providing that the pro bono lawyer does not "participate" in the conflicting work that the government office undertakes. We further note, however, that Rule 1.7 regarding concurrent personal conflicts of interest must be fully complied with by both the pro bono lawyer and the government lawyer. Thus, if there is a "significant risk that the representation of" either the pro bono or the government client "will be materially limited" by the attorneys' relationships with one another or by either attorney's personal interests, the conflicting representation cannot go forward.

Finally, we note that this interpretation of the Rules of Professional Conduct does not control whether a court will find grounds to disqualify an attorney or an office, particularly where there are constitutional rights involved. While "screening" is not required of government lawyers under these rules, undertaking a screening mechanism (see below) may be wise to minimize the possibility of

disqualification.

Establishing Separate Divisions to Handle Possible Conflicts

The County Attorney asks about the viability of assigning civil work for domestic violence victims to an individual or division within the County Attorney's Office separate from the individual or division that prosecutes criminal cases.

This scenario adds one further complication to the analysis above in that it proposes doing work for a client (the victim) while being paid by another entity (the county) as addressed in Rule 1.8(f) Utah Rules of Professional Conduct. Such an arrangement is permissible only if the attorney maintains a confidential relationship solely with the victim-client (not the county-employer), permits only the victim client to direct the attorney's work, and obtains informed consent to this arrangement from the victim client. "Informed consent" is now defined in the Utah Rules of Professional Conduct as denoting "an agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

Here, again, Rule 1.11 would not impute the disqualification of one government attorney to other governmental attorneys if each of the two attorneys did not "participate" in the conflicting work of the other. The underlying concern is that for each client confidentiality and independent legal judgment must be fully protected.

This Committee considered the issue of conflicts of interest within a governmental law office in Opinion No. 142 (1994) dealing with the office of the Attorney General. Opinion No. 142 established that Rule 1.10 (defining a "firm" and imputing disqualification to all within the "firm") does not apply to the office of the Attorney General and the conflicts of one Assistant Attorney General are not necessarily imputed to all other attorneys in that office. Opinion No. 142 (1994). That Opinion concludes that the Office may represent different agencies with adverse interests or positions so long as "the attorneys with conflict problems are removed and screened from the particular representation at issue." Accordingly, the Attorney General's office has been organized to operate through different "divisions."

While there were constitutional reasons for that analysis with regard to the Attorney General, we now make clear that other governmental law offices are also permitted to organize themselves in such a way as to constitute two separate "firms" 9 and undertake conflicting representation. In order to guard most effectively against disqualification motions, it would be "prudent" for the attorneys with

potentially conflicting responsibilities to be entirely screened from one another, not sharing access to the same confidential files (see Rule 1.6) or operating so that one attorney has "managerial authority" or "supervisory authority" over the other (see Rule 5.1). However, even if no formal screening system is put in place, government attorneys comply with the ethical rules if they ensure they do not "participate" in any matter for which they have a personal conflict of interest.

We further note that undertaking such an endeavor in which one section of a government office represents victim-clients would result in the governmental entity owing all the duties of a lawyer to the victim-clients and those victim-clients having possible claims against the governmental entity.

Conclusion:

The conclusion is that it could be possible for a County Attorney's Office to organize itself in such a way as to ethically provide representation for individual client victims in civil cohabitant abuse actions and then later permit a separate division or attorney in the Office to represent the state in any related criminal prosecution. However, any such organization would have to prohibit any confidential information from flowing from one sector to the other. Similarly, it is possible for a government lawyer to undertake pro bono representation without having a conflict imputed to other government lawyers provided the pro bono lawyer is kept entirely apart from any conflicting representation (and the other government lawyers have no access to the pro bono lawyer's confidential files and no ability to influence the pro bono lawyer in his work.) Whether those services are provided by separate divisions or by pro bono representation, the County Attorney's Office would have to assure that there was no "significant risk" that the county attorney's representation of the victim client would be "materially limited by the lawyer's responsibilities" to the county or by the attorney's "personal interest" as a county attorney. Rule 1.7(a).

Footnotes

1 We note that providing "general legal information" or "clerical assistance" to a victim seeking a protective order is not the "practice of law" and hence can be undertaken by the staff of the court or the county attorney's office. See Supreme Court R. Prof. Prac., ch. 13A, Rule 1.0 (c) (2005).

2 This Committee has also addressed conflicts of interest as they apply to the Office of the Attorney General Opinion in No. 142, to an Assistant Attorney General serving as a hearing officer in Opinion No. 03-01, and to a private attorney with a partner who serves as a part-time judge in Opinion No. 95-02A which are related and relied upon to

some extent here.

3 We note that such pro bono work would not be part of the attorney's duties for the county and thus the county could incur no liability for it and the client would need to be fully and clearly advised that the attorney is not acting in the capacity as a government lawyer but as a private volunteer.

4 *State v. Brown* 853 P.2d 851 (Utah 1992) prohibits a prosecutor from appearing as defense counsel in a criminal case. The Committee concluded that the on-going civil representation of a person also charged with a crime would be prohibited under Rule 1.7 because the lawyer's responsibilities to another client (the county) would materially limit his representation of the client.

5 Inconsistent with Opinion No. 98-01, we concluded in Opinion 01-06A that a part-time county attorney would have to withdraw from representing the victim in a civil cohabitation abuse action as well. To the extent that conclusion is over broad, our opinion here is to be considered as modifying Opinion 01-06A. Rather, Rule 1.7(a) would find a conflict where "there is significant risk that the representation" of the victim client would be "materially limited by the lawyer's responsibilities" to the county or by the attorney's "personal interest" as a county attorney. This is a fact-specific and case-specific inquiry. We note that the "personal interest" of a part-time county attorney who also maintains a part-time private practice may be factually different from the interest of a full-time county attorney undertaking occasional pro bono representation.

6 Paragraph (e) and Comment [7] were added to Rule 1.10 and Comments [2], [3] and [9] were added to Rule 1.11 together with a redrafted paragraph (d) of Rule 1.11 seeking to clarify that Rule 1.11 is the exclusive rule governing imputation of conflicts of interest applicable to current or former government lawyers. See ABA Model Rules 2000 with Redlining and the Reporters Explanation Memos available on the ABA website at: http://www.abanet.org/cpr/e2k-report_home.html

7 This Committee's Opinion 98-01 states: "In withdrawing from the criminal matter, the limitations and requirements of Rule 1.10 . . . describing imputed disqualification among attorneys associated in a firm, must also be strictly followed." While this interpretation applies to the part-time attorney withdrawing from his private practice representation; it does not apply to a part-time county attorney withdrawing from any governmental representation.

8 Rule 1.12 governs imputed disqualification of an attorney (including a government attorney) who had previously

served as a judge, other adjudicative officer or law clerk.

9 Utah Rules of Professional Conduct (2005) now define "firm" to include "other association authorized to practice law . . . or lawyers employed in . . . the legal department of a corporation or other organization." Rule 1.0