

Utah Ethics Opinions

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06-05. UTAH STATE BAR ETHICS ADVISORY OPINION COMMITTEE

Opinion No. 06-05

Issued December 30, 2006

1 Issue: Do the Utah Rules of Professional Conduct¹ preclude a lawyer from participating in an *ad hoc* legal advisory group to a private, nonprofit, public interest legal organization, if the persons served by the legal services organization have interests adverse to the interests of a client of the lawyer or the lawyer's law firm?

2 Conclusion: Generally, no. Rule 6.3, with respect to legal services organizations, and Rule 6.4, with respect to organizations involved in the reform of law or its administration, provide that service as an officer or director of such organizations or membership in such organizations does not by itself create an attorney-client relationship with the organization or the organization's clients. These rules do require that a lawyer be observant of the lawyer's duties under Rule 1.7 to the lawyer's clients and to the clients of the lawyer's firm. Rule 6.3 requires that the lawyer not knowingly participate in a decision of the organization that are incompatible with the lawyer's obligations under Rule 1.7 or that could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer or on the representation of a client of the lawyer or the lawyer's firm. Rule 6.4 requires that when the lawyer knows a client of the lawyer may be materially benefited by a decision of the law reform organization, that the lawyer-member disclose this fact to the organization. Under some circumstances, a lawyer's participation on an *ad hoc* litigation advisory group may create an attorney-client relationship with the organization or the organization's clients requiring the lawyer to comply with Rules 1.6, 1.7 and 1.9 before representing or continuing to represent clients adverse to the interests of the organization or the organization's clients in such matters.

3 Background: The legal services entity requesting this opinion defines itself as a private, nonprofit, public interest organization. The organization's mission is to enforce and strengthen laws that protect the opportunities, choices and legal rights of certain disadvantaged people in Utah. The organization provides free legal services to such individuals.

⁴ In an effort to improve services and provide the best legal

representation possible, the organization's board of trustees proposes to establish an *ad hoc* litigation advisory group consisting of experienced and knowledgeable private attorneys. This advisory group of *pro bono* attorneys would be called upon from time to time to answer questions and provide advice on various issues that arise as the organization represents various clients. The organization anticipates most questions would be procedural in nature or would involve general litigation strategy issues.

⁵ In the process of establishing the litigation advisory group, questions have arisen about possible conflicts between the interests of clients of advisory group members or their law firms and the organization and/or the organization's clients. Specifically, the organization has asked whether Rules 6.3 or 6.4 of the Utah Rules of Professional Conduct apply to members of a litigation advisory group, and if so, under what circumstances the lawyer-members who represent clients or whose law firms represent clients with interests adverse to the organization's clients could nonetheless serve on the advisory group.

6 Analysis: The most relevant rules at issue are Rule 6.3 and Rule 6.4. Rule 6.3 provides:

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) If participation in the decision would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) Where the decision could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer or on the representation of a client of the lawyer or the lawyer's firm.

Rule 6.4 provides:

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

⁷ The term "legal services organization" in Rule 6.3 is undefined. Rule 7.5(a) is the only other rule to use the phrase "legal services organization," and the word

"charitable" is added in that rule as a preceding adjective. From this choice of language, we conclude that a "legal services organization" may include entities other than *pro bono* organizations, but it certainly includes the organization requesting this opinion and similar organizations that provide legal services for indigents.²

8 The phrase "organization involved in reform of the law or its administration" in Rule 6.4, like the phrase "legal services organization" in Rule 6.3, is not defined. Yet, the ABA annotations to both rules make it clear that the entities the rules cover include those that participate in activities for improving the law, the legal system or the legal profession. "What Rule 6.3 does for lawyers serving on boards of legal services organizations, Rule 6.4 does for lawyers serving on the board of 'law reform organizations'."³

9 Both Rules 6.3 and 6.4 use the phrase "director, officer or member" to describe those participating lawyers expressly covered under the rule. The official comments to these rules are similarly focused on "lawyers serving on boards." Because the terms "director, officer or member" and "board" are not defined, the question arises whether a member of a litigation advisory group, such as that described by the legal services organization requesting this opinion, falls within the ambit of the rules' protection for directors, officers or members. From the ABA annotation and commentary on each rule, we conclude that, consistent with the intent of both rules, litigation advisory group members have the same status as a "director, officer or member."

10 For example, comment [1] of Rule 6.3 states that, "Lawyers should be encouraged to support and participate in legal service organizations."⁴ The ABA annotations to the Rules further stress that the Rules should be construed "to promote this kind of service."⁵ Encouragement of lawyer participation would be undermined if the protections afforded lawyers serving on boards or afforded to officers and members were not likewise inclusive of members of advisory groups, including litigation advisory groups.

11 Rule 6.3 contemplates that the legal services organizations to which it pertains serve persons whose interests may be adverse to the interests of clients served by the lawyer-member or the lawyer-member's law firm. The rule and its comments make clear that the lawyer's membership in the organization or service as an officer or director of the organization does not itself create an attorney-client relationship between the lawyer and the organization or between the lawyer and those persons served by the organization. To encourage lawyer participation in legal services organizations, the rule limits the circumstances under which such participation will disqualify a lawyer or the lawyer's firm from representation of clients with interests adverse to the interests of the

organization or adverse to the interests of the persons served by the organization.⁶

12 Rule 6.3 provides, however, that a lawyer may not knowingly participate in a decision or action of the organization (a) if such participation "would be incompatible with the lawyer's obligations to a client under Rule 1.7," or (b) if the decision would have a material adverse effect (i) "on the representation of a client of the organization whose interests are adverse to a client of the lawyer" or (ii) the representation of a client of the lawyer.⁷ Rule 6.3 teaches that a lawyer-member of a legal services organization may avoid the potential conflicts of interest that may arise from these circumstances by not participating in such decisions or actions.

13 The words "participate in an action or decision" as used in Rule 6.3 are also undefined, but, in context, we conclude that they mean the lawyer cannot knowingly discuss, recommend, advocate or vote upon any matter that conflicts with the lawyer's duty of loyalty under Rule 1.7 or duty of confidentiality under Rule 1.6 to the clients of the lawyer and the lawyer's firm. Rule 6.3(a) uses the words "would be incompatible." Rule 6.3(b) uses the words "could have a material adverse effect." The rule thus applies to potential conflicts of interest as well as actual conflicts. Therefore, when the lawyer knows that an actual or potential conflict exists between the interests of the organization or the organization's clients and the interests of the clients of the lawyer or the lawyer's firm, the litigation advisory group member should recuse himself from any discussion of the matter.⁸

14 Legal services organizations and the person served by legal services organizations frequently engage legal counsel. Such legal counsel may also be members, officers or directors of the organization. Rule 6.3 does not preclude the formation of an attorney-client relationship between such a lawyer and the organization or between such a lawyer and the organization's clients. In these circumstances, the lawyer may not represent the organization's interests or the interests of the person served by the organization adverse to the interests of the clients of the lawyer or the lawyer's firm without complying with Rules 1.6, 1.7 and 1.9.

15 A lawyer in the capacity of a member of a litigation advisory group to a legal services organization consulted by the organization regarding legal advice and strategy in specific legal matters may be reasonably perceived by the organization as being its lawyer with respect to the matter. Rule 6.3's protections against disqualification of the lawyer and the lawyer's firm from representing clients with interests adverse to the organization's interests in such matters or adverse to the interests of the persons served by the organization in such matters would no longer be

applicable. The lawyer will, in such circumstances, establish an attorney-client relationship with the organization or the organization's clients.⁹

16 Participation by the lawyer in the litigation advisory group that is in the nature of recommending general policies or procedures for the conduct or administration of litigation by the organization or recommending general strategy for the organization's use of litigation to accomplish the goals of the organization or its clients would not reasonably appear to create an attorney-client relationship between the organization and the lawyer or between the organization's clients and the lawyer. To the extent that the litigation advisory group is intended to (a) review the facts and pleadings in specific legal matters and to advise the organization or its clients regarding the legal rights of those clients in such specific matters, and (b) recommend legal strategy to advance those rights in such specific legal matters, the lawyer's participation will likely exceed the participation of a director, officer or member intended for protection by Rule 6.3. Members of a litigation advisory group providing such services may create an attorney-client relationship with the organization or its clients that would require that the lawyer comply with Rules 1.6, 1.7 and 1.9 before the lawyer or the lawyer's firm could represent clients with interests adverse to the interests of the organization or the interests of the organization's clients in such matters.¹⁰

17 Comment [2] to Rule 6.3 cautions legal services organizations that in appropriate cases it may be necessary that the organization's clients be assured that their representation will not be adversely affected by conflicting loyalties of a member, officer or director of the organization.¹¹ The comment encourages legal services organizations to adopt written policies to enhance the credibility of such assurances.

18 The comments to Rule 6.3 do not suggest specific appropriate client assurances or policies the organization could implement. The ABA commentary on Rule 6.3 of the Model Rules of Professional Conduct provides:

When a lawyer who serves on an organization's board is representing a client, and finds that a particular organizational action or decision would be incompatible with the lawyer's obligations to the client under Rule 1.7 [Conflict of Interest: Current Clients] the lawyer simply is not allowed to participate in that action or decision.¹²

It would be appropriate for the legal services organization to adopt written policies requiring the organization's advisory group members to identify those decisions or actions coming before the group that would or could conflict with the lawyer's duties to an existing client. In such circumstances, it would be appropriate for the

organization's written policies to require that the lawyer disqualify himself from participation in the appropriate organization action or decision.

19 From the facts submitted to us, the legal services organization may also constitute "an organization involved in the reform of the law or its administration" under Rule 6.4. Unlike Rule 6.3, which contemplates the organization will have clients served by the organization, Rule 6.4 does not contemplate that the organization serves clients. Rule 6.4 does not address the concern that the interests of the persons served by the organization may conflict with the interests of a client of the lawyer. Rather, Rule 6.4 addresses the concern that the interests of the lawyer's clients may be affected by the law reform activities of the organization.

20 As under Rule 6.3, Rule 6.4 and its comment make clear that the lawyer's participation in the law reform organization as a director, officer or member does not by itself create an attorney-client relationship with the organization.¹³ Therefore, even though the law reform activities may adversely impact a client, the lawyer's participation will not normally violate Rule 1.7. However, the Comment [1] to Rule 6.4 makes clear that under certain circumstances the lawyer's participation in the law reform organization may violate Rule 1.7: "In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other rules, particularly Rule 1.7."

21 Under Rule 1.7(a)(2), a lawyer may have a conflict of interest arising from participation in a law reform organization where the lawyer does not represent the organization, if the lawyer's duties to the organization as a "third party" or the lawyer's "personal interest" creates a significant risk that the lawyer's representation of his or her clients may be materially limited. Rule 6.4 also requires a lawyer participating in a law reform organization to disclose to the organization if the lawyer knows that the interests of a client of the lawyer may be materially benefited by a decision of the organization in which the lawyer participates. Such disclosures are required to protect the integrity of the law reform program.¹⁴

22 Service on a litigation advisory group to a law reform organization may also involve specific legal advice to the organization about specific litigation, for example, legal advice in a lawsuit challenging the constitutionality of a statute. Such participation in a law reform organization may result in an attorney-client relationship between the lawyer and the organization. Under such circumstances, the lawyer could not represent clients with interests adverse to the organization's interests in such matters without complying with Rules 1.6, 1.7 and 1.9.

Footnotes

1. Unless otherwise indicated, all references to the "Rules" in this opinion are to the Utah Rules of Professional Conduct, effective November 1, 2006.

2. See ABA, ANN. R. PROF. CONDUCT 520 (5th ed.) (2003).

3. *Id.* at 523.

4. Rule 6.3, cmt. [1].

5. ABA, ANN. R. PROF. CONDUCT 520.

6. Comment [1] to Rule 6.3 states: "A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed."

7. Under Rule 1.10, a lawyer should not participate in a decision that could have a material adverse effect on the representation of a client by the lawyer's firm.

8. In such instances the lawyer's obligation to recuse himself is a personal conflict of interest.

9. The lawyer's participation on the litigation advisory group may also under limited circumstances create an attorney-client relationship with the persons served by the organization. If a litigation advisory group member met with the organization's clients and offered legal advice or recommended legal strategies with respect to a specific legal matter, the lawyer may reasonably be perceived by the organization's clients as their lawyer with respect to the matter. Normally, however, direct contact between the litigation advisory group member and the organization's client would be required to form an attorney-client relationship.

10. We assume for purposes of this Opinion that the members of the litigation advisory group are not subject to the protections of Rule 6.5 of the Utah Rules of Professional Conduct, which applies to short-term limited legal services provided under the auspices of programs sponsored by a nonprofit organization or a court.

11. "It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the Board. Established, written policies in this respect can enhance the

credibility of such assurances." Rule 6.3, cmt. [2].

12. ABA, ANN. R. PROF. CONDUCT 520.

13. The comment to Rule 6.4 provides:

Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefited.

14. It is noteworthy that Rule 6.3 requires the lawyer to be recused and not participate in certain decisions and actions of the legal services organization. Rule 6.4 permits a lawyer to participate in a decision of the law reform organization that benefits the lawyer's client, if the lawyer discloses this fact.