UT Eth. Op. 142 (Utah St.Bar.), 1994 WL 579850

Utah State Bar
Ethics Advisory Opinion Committee
Opinion Number 142
Approved March 10, 1994

***1** Issue: The Office of the Utah Attorney General has requested an advisory opinion concerning whether the rules of imputed disqualification apply to that office when it is fulfilling its duty of representing all state agencies, some of which may be adverse to each other on certain issues.

Opinion: In these circumstances, the conflict of interest rules apply only on an attorney-specific basis, and conflicts in the Office of the Utah Attorney General should not be imputed to all attorneys in that office. Nevertheless, the conflicts rules must be fully satisfied on an individual lawyer basis, and the Attorney General must ensure that attorneys with conflict problems are removed and screened from the particular representation at issue.

Analysis: Typically, if one attorney in a firm or office has a conflict of interest, that conflict is imputed to all attorneys in that office. [1] For two main reasons, we conclude that Rule 1.10 of the Rules of Professional Conduct does not apply as broadly to lawyers working in the Office of the Utah Attorney General.

The Rules of Professional Conduct apparently make no explicit provision for imputed disqualification in this context. The comments to Rule 1.10 define "firm" as "lawyers in a private firm, and lawyers employed in the legal department of a corporation or other organization, or in a legal services organization." This definition does not seem expressly to include or exclude lawyers in a governmental office such as the Utah Attorney General. [2] Therefore, we turn to a more general analysis.

First, there are constitutional as well as practical policy reasons for not applying the imputed disqualification rule to the Office of the Utah Attorney General. The Utah State Constitution gives the Attorney General the duty of representing the State. [3] Application of the imputed disqualification rule to the Attorney General could frustrate, if not completely preclude, the fulfillment of this constitutional mandate. Because of the large number of attorneys employed by the Attorney General, there could be numerous occasions where imputed disqualification would occur, requiring the retention of private counsel to represent the State. Additional expense to the taxpayer in these situations could be enormous.

Second, other ethics advisory committees facing a similar situation issue have reached the same basic conclusion. [4] Although some other jurisdictions have reached different results in arguably similar, but not identical contexts, [5] we believe our conclusion here is most appropriate for the circumstances in which this request for an opinion was raised. Nevertheless, the Office of the Attorney General may encounter conflicts so pervasive or severe that the only prudent course of action is to hire outside counsel. Such circumstances should be judged on a case-by-case basis.

***2** Furthermore, the fact that Rule 1.10 does not apply to the Office of the Attorney General in these circumstances does not relax the independent application of Rules 1.7, 1.8, 1.9, and 1.11 to each lawyer in that office. Any lawyer or supervising lawyer in that office who cannot individually satisfy the requirements of those rules should not engage in the representation in question. Moreover, despite being free from the imputed disqualification rule in these circumstances, the Office of the Attorney General must adopt procedures to ensure that individual lawyers with conflict problems are sufficiently removed and screened from those matters so as not to compromise client confidences or any other purposes related to the representation as promoted by the Utah Rules of Professional Conduct.

  

Footnotes

1 Utah Rules of Professional Conduct 1.7, 1.8, 1.9 and 1.10.

2 In the context of movement of lawyers between the government and the private sector, Rule 1.10 comments note that "the government's recruitment of lawyers would be seriously impaired if Rule 1.10 were applied to the government." The comments to Rule 1.11(c) suggest conflicts of a lawyer serving as a public officer or employee do not serve to disqualify "other lawyers in the agency with which the lawyer has become associated." See also Rule 1.7 cmt. ( "government lawyers in some circumstances may represent gov ernment employees in proceedings in which a government agency is the opposing party" ). Nevertheless, we conclude that the comments are too unclear on this point to provide a basis for our opinion here.

3 Utah Const., Article VI, Section 16.

4 See, e.g., Opinions of Ethics Comm. of the Mass. Bar Ass'n, Op. 89-4 (1989), ABA/BNA Lawyers' Manual on Professional Conduct 901:4604 (city solicitor allowed to advise city employee about litigation by city against private party who has previously been represented by another lawyer in city solicitor's office if the lawyer with the conflict is sufficiently screened from involvement); Ethics Comm. of N. Car. State Bar Ass'n, Op. 55 (1989), ABA/BNA Lawyers' Manual on Professional Conduct 901:6610 (lawyer who is a member of the attorney general's staff and represents a state hospital may pursue appeals of Medicaid decisions even though opposition will be represented by another lawyer from attorney general's office.)

5 See, e.g., People v. Brown, 624 P.2d 1206 (Cal. 1981) (attorney general not allowed to bring suit in its own name on issue where it had previously given legal advice on same issue to party it was seeking to sue on that issue).

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