

ETHICS OPINION

010417

FACTS: A county public defender recently accepted a job as city attorney for a city located within the county. The bulk of the county's population resides within the city's jurisdiction.

QUESTION PRESENTED: May the county public defender continue to defend within the county while also criminally prosecuting on behalf of the city?

ANSWER: No.

DISCUSSION: An attorney may not simultaneously occupy the positions of a city attorney with prosecutorial functions and county public defender when the jurisdictions overlap. The proposed representation creates a conflict of interest of the type identified by Rule 1.7 of the Montana Rules of Professional Conduct.

Rule 1.7 provides:

RULE 1.7 Conflict of Interest: General Rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and*
- (2) each client consents after consultation.*

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibility to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and*
- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.*

A criminal defendant's interests are, almost by definition, adverse to the interests of the political subdivision's (i.e., cities, towns and counties) law enforcement authority.

Rule 1.7 conflicts may be overcome if two conditions are met: (1) the attorney reasonably believes that the representation of each client will not be adversely affected, and (2) each client consents. In some situations, however, an attorney can not "reasonably believe" that the dual representation would not be "adversely affected." In such cases, it is irrelevant whether the clients' consent can be obtained; the representation is not permitted.

The Model Rule Comment 5 to Rule 1.7 sets forth the standard for determining whether it is proper to obtain a client's consent to otherwise impermissible representations: "[W]hen a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent." Application of this standard to the present facts leads us to believe that client consent is irrelevant and that the conflict cannot be overcome. As our opinions are advisory only, we advise that the proposed conduct is likely unethical, not flatly decide that it is.

The 1992 ABA Standards For Criminal Justice, Standard 3-1.3(b) provides "A prosecutor should not represent a defendant in criminal proceedings in a jurisdiction where he or she is also employed as a prosecutor. While these standards have not been adopted in Montana, they are helpful advisory counsel.

Ethics Opinion 881130 addresses the same general issue presented here and explains:

[F]or the city attorney charged with public duties including the prosecution of crimes to accept employment in defense of one charged with crimes, would appear to place him in [a] position adverse to his public employer likely to destroy public confidence in him as a public officer and thus bring reproach to his profession, as well as to himself. This apparent conflict of interest should be avoided.

This Committee agrees.

CONCLUSION: An attorney may not simultaneously occupy the positions of a city attorney with prosecutorial functions and county public defender when the jurisdictions overlap.

THIS OPINION IS ADVISORY ONLY