

Ethics Opinion

910604

QUESTION PRESENTED: Can a present county attorney who has been handling an estate of a deceased person since before his county attorney appointment conduct a criminal investigation involving the deceased person? The county attorney shares his office with a part-time deputy county attorney, who had begun the investigation before the present county attorney was elected.

ANSWER: No.

ANALYSIS: It is our opinion that given the relationship between the present county attorney and his deputy, it would be improper for the county attorney to conduct or coordinate the criminal investigation involving the deceased person. The relationship between the county attorney and his deputy is certainly analogous to the association of lawyers in a firm. [See Rule 1.10.] While perhaps not directly on point, Rule 1.17 provides:

An attorney employed by a department of the State of Montana or municipality on a part-time basis shall not accept other employment during the course of which it would be possible to use or otherwise rely on information obtained by reason of government employment that is injurious, confidential or privileged and not otherwise discoverable.

Clearly, it would have been improper for the deputy to agree to represent the estate after he became a deputy county attorney. In this case, however, he was already representing the estate when he became the deputy county attorney. Likewise, it would be improper for the county attorney to handle the investigation while his deputy is representing the estate. Although "appearance of impropriety" is no longer an express part of the Rules of Professional Conduct, it is our opinion that under the circumstances set forth, the public will almost certainly conclude that its interests are not being protected unless the investigation is thoroughly and promptly concluded, regardless of the cost. The county attorney will likely have to appoint a special prosecutor.

Terminating the office sharing arrangement will not resolve the problem. The conflict existed once the county attorney took office, and if the county attorney pursues the investigation, the estate could certainly claim that the county attorney had access to its confidential files while the office-sharing arrangement was in existence.

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