# Ethics for the State and Local Government Attorney

*by Keith A. Call*

According to my unofficial count, there are approximately 255 Attorneys General in Utah. That easily makes the AG's office the largest law firm in Utah. There are approximately fifty-five U.S. Attorneys. Utah has twenty-nine counties, each of which has some form of County Attorney. As of 2010, according to the "official" internet source Wikipedia, Utah had 243 incorporated cities and towns. And there are more water, sewer, fire, snow removal, animal control, and other special service districts, commissions, boards, and committees than I know how to count.

Each of these government entities needs legal counsel, making the demand for government legal services a major part of Utah's legal economy. State and local government attorneys face unique ethical dilemmas in a unique context. This article addresses some of the more common ethical questions.

## Who Is the Client?

Let's start with the biggest question of all. A government attorney's client is…[drumroll]…the government entity, of course. But what does that really mean? Rule 1.13(a) states that an organization's attorney represents the organization "acting through its duly authorized constituents." Utah R. Prof'l Conduct 1.13(a). A government entity can act through its voters, its elected governing board, its elected officials, and its employees. To which of those groups does the attorney owe her duties of loyalty, confidentiality, and communication?

Utah Rule of Professional Conduct 1.13 contains an additional relevant provision not included in the Model Rules. Rule 1.13(h) specifically provides that the "government lawyer's client is the governmental entity except as the representation or duties are otherwise required by law." *Id.* 1.13(h). This rule recognizes that a government lawyer's duties to his or her client under Rule 1.13 can be modified by duties required by law for government entities. The comments to the rules clearly indicate a softening of rules related to conflicts and confidentiality for government lawyers. *See, e.g.*, Rule 1.13 cmt. 13a–13b.

Candidly, these special provisions for government lawyers may add more confusion than clarity. For example, government attorneys often work closely with the individuals who make up that government. Close relationships developed with those individuals may make it difficult for the attorney to place the interests of the governing board over the interests of those individuals.

If a government attorney leads an employee to believe that the attorney represents the employee individually, the government entity may lose control over confidentiality and privilege decisions concerning the attorney's conversations with that employee. For example, in 2011, a child sex abuse scandal broke open at Penn State University when assistant football coach Jerry Sandusky was indicted on fifty-two counts of child molestation. In January 2016, a Pennsylvania appellate court ruled that the University's general counsel at the time, Cynthia Baldwin, had confused her roles, leading the University President, Graham Spanier, to believe that she represented him personally. In an appeal of Graham's motion to exclude some of the charges, the court said, "We find that Ms. Baldwin breached the attorney-client privilege and was incompetent to testify as to confidential communications between her and Spanier during her grand jury testimony." *Commonwealth v. Spanier*, 132 A.3d 481, 482 (Pa. Super. 2016). The court threw out perjury charges that were based on Ms. Baldwin's testimony. *Id.* at 482, 498.

The same concerns can arise with individual board members. Assume a county commissioner visits the office of the county attorney, closes the door, and says, "I've got something important to tell you. Can we keep this just between you and me?" As much as that attorney might want to agree, his ethical obligations should prevent him from promising to keep the conversation confidential. The attorney owes an ethical duty to the government entity as a whole, not to individual commissioners. If the commissioner tells the attorney something that affects the interests of the county, then the attorney likely has an obligation to share that information with the commission in order to protect the county's interests.

*KEITH A. CALL is a shareholder at Snow Christensen & Martineau, where his practice includes professional liability defense, IP and technology litigation, and general commercial litigation.*

What if a newly elected council member demands that the city attorney reveal what occurred in a closed session between the attorney and the "old" council last year? Again, the attorney's duty of confidentiality runs to the council as a whole. The attorney has an obligation not to disclose information relating to her representation of the city – even to a member of the city council – without approval from a majority of the council. One would hope that the council would not mind if new members are briefed on past confidential discussions with the city attorney, but that is a decision for the council to make and not the attorney.

### What Conversations Are Covered by a Government Entity's Attorney-Client Privilege?

The attorney-client privilege has been codified by statute in Utah: "An attorney cannot, without the consent of the client, be examined as to any communication made by the client to the attorney or any advice given regarding the communication in the course of the professional employment." Utah Code Ann. § 78B-1-137(2). Similarly, Utah Rule of Evidence 504(b) provides:

> A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications:
>
> (1) made for the purpose of facilitating the rendition of professional legal services to the client; and
>
> (2) the communications were between:
>
> (A) the client and the client's representatives, lawyers, lawyer's representatives, and lawyers representing others in matters of common interest; or
>
> (B) among the client's representatives, lawyers, lawyer's representatives, and lawyers representing others in matters of common interest.

Utah R. Evid. 504(b).

Further, Utah courts have required a party seeking to rely on the attorney-client relationship to establish three elements: (1) an attorney-client relationship; (2) the transfer of confidential information; and (3) the purpose of the transfer was to obtain legal advice. *See, e.g., S. Utah Wilderness All. v. Automated Geographic Reference Ctr.*, 2008 UT 88, ¶ 33, 200 P.3d 643;

The attorney-client privilege exists for governments under state law. *See, e.g., id.* ¶ 32 (holding that provision of GRAMA protects records of communications between governmental entity and attorney representing the entity if the communications fall under the general statutory attorney-client privilege found in Utah Code section 78B-1-137). The *Southern Utah* court held that the privilege is the same "regardless of the statutory source." *Id.*

A key question for the government lawyer is, "Who is the 'client's representative'?" The answer is found in Rule of Evidence 504(a)(4), which defines "representative of the client" to be persons who are authorized (1) to obtain legal services, (2) to act on the legal advice provided, or (3) specifically to communicate with the lawyer concerning a legal matter. Utah R. Evid. 504(a)(4). The rules committee specifically designed this to be broader than just the "control group" for the organization. *See id.*, advisory committee note to 2011 amendment.

Thus, Utah takes a more expansive approach to the definition of privilege than some state and federal jurisdictions. Government employees who fit any of the three classes of "client representative" are protected by the privilege provided the other elements of the privilege are met.

### May the Government Attorney Advise Different Agencies or Departments within One Local Government?

At first glance, this seems like a dumb question. While big cities and big counties may have large legal staffs, most local governments in Utah may have one or two attorneys providing legal assistance for all of its departments and employees. All of those departments


CONGRATULATIONS

*Andrew M. Morse*

Inducted into the

**International Academy of Trial Lawyers**

We congratulate our colleague and friend, Andrew M. Morse who has been inducted as a Fellow into the International Academy of Trial Lawyers. The Academy invites only lawyers who have attained the highest level of advocacy. A comprehensive screening process identifies the most distinguished members of the trial bar by means of both peer and judicial review.

SNOW CHRISTENSEN & MARTINEAU

www.scmlaw.com

and employees are part of the same client so there aren't any conflict issues to worry about, right?

That's usually true, but not always. Consider a situation in which the attorney is asked to advise a government official on a particular decision and later asked to advise the board charged with reviewing that decision. The attorney's involvement with the decision and the review of that decision could raise both conflict and due process concerns.

Consistent with Rule 1.13, the preamble to the Utah Rules of Professional Conduct includes an important provision applicable to government attorneys. It seems to limit application of the Rules of Professional Conduct in some government situations:

> Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. *Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.*

Utah R. Prof. Conduct, Preamble: A Lawyer's Reponsibililites, ¶ 18 (emphasis added).

The comments to Rule 1.13 also signal more lenient conflict of interest standards for government lawyers. For example, "In representing the legislative body and the various interests therein, the lawyer is considered to be representing one client and the rules related to conflict of interest and required consent to conflicts do not apply." Utah R. Prof'l Conduct 1.13 cmt. 13b. The comments specifically state that a government lawyer for a legislative body may concurrently represent the interests of the majority and minority leadership, members and members-elect, committee members, staff of the legislative body, and the various interests involved. *Id.* In these situations, "the rules related to conflict of interest and required consent to conflicts do not apply." *Id.*

This leaves open many questions about when the Utah Rules of Professional Conduct apply to government lawyers and when they don't. The Utah State Bar Ethics Advisory Committee has provided some guidance.

In 1994, the Committee issued an opinion that specifically addresses conflicts within the Utah Attorney General's (AG) office. *See* Utah State Bar Ethics Advisory Op. 142 (March 10, 1994).The Committee concluded that the rules of imputed disqualification apply only on an attorney-specific basis within the AG's office. *Id.* Thus, as long as appropriate screening is implemented, different attorneys within the AG's office can engage in conflicting representation. *Id.* The Committee reasoned that the comments to Rule 1.10 defined "firm" in a way that did not include the AG's office. *Id.* More importantly, the Committee reasoned that application of the imputed disqualification rule could frustrate the AG's constitutional mandate to represent the State. *Id.* The opinion noted that the AG "may encounter conflicts so pervasive that the only prudent course of action is to hire outside counsel." *Id.* The opinion also stressed that the individual lawyer in the AG's office must satisfy the conflict rules. *Id*. The Committee subsequently extended this opinion to full-time county attorney offices. See Utah State Bar Ethics Advisory Op. 98-06 (Oct. 30, 1998).

In 1995, the Committee opined that the AG may ethically appeal the decision of a division of a state agency to the executive director of that division. Utah State Bar Ethics Advisory Op. 95-07 (Sept. 22, 1995). In essence, the AG can appeal an administrative decision of her own client!

In that situation, a Division within state agency was responsible for the regulation of certain licensed professionals. *Id.* A Board within the agency had authority to make recommendations to the Division affecting the rights of individual professionals. *Id.* The Director of the Division could affirm or modify the Board's recommendation. *Id.* The Director's decision could be appealed to the Agency's Executive Director. *Id.*

An Assistant AG had represented the Division in a particular disciplinary proceeding. *Id.* The Division's Board ultimately recommend sanctions much less harsh than those sought by the Division. *Id.* The Division's Director adopted the Board's recommendation. *Id.* The AG, acting in her own name and purportedly "on behalf of the public," appealed the Division's order to the Agency's Executive Director. *Id.* In essence, the AG, acting on behalf of the public, appealed the decision of her own client, the Division. *Id.*

The Committee opined the AG had authority to do this and did not violate any ethical rule in doing so. *Id.* The Committee cited constitutional and statutory responsibilities of the AG and the Preamble to the Rules and recognized that a "government attorney compelled by law to service different masters with varied interests… is likely to encounter conflicts of interest regularly." *Id.* The

Committee concluded that the AG has broad discretion to determine which master to serve in the "public interest." *Id.*

Similarly, the Committee opined that different attorneys in a county attorney's office, properly screened, may represent a county official and the county in an action to prevent unlawful payment of county funds by that county official. Utah State Bar Ethics Advisory Op. 98-06 (Oct. 30, 1998).

Finally, the Committee has ruled that an Assistant AG may act as a hearing officer (adjudicator) for a Utah government agency on a matter for which the AG's office may subsequently take on an advocacy role on behalf of that same agency. Utah State Bar Ethics Advisory Op. 03-01 (Jan. 30, 2003).

The Rules of Professional Conduct and government lawyer's statutory duties clearly do not fall neatly in a coherent, square box. In this complex arena, it is critical for the government lawyer to exercise good faith. In the context of Rule 1.13 at least, the government lawyer's good faith seems to approach a safe harbor. *See* Utah R. Prof'l Conduct 1.13 cmt. 13a ("A government lawyer following these legal duties in good faith will not be considered in violation of the ethical standards of this Rule.").

### May an Attorney Represent More than One Local Government?

Yes. In a 1998 Opinion, the Ethics Advisory Opinion Committee opined that it is not per se unethical for an attorney to represent both a county and a city within the county on civil matters. Utah State Bar Ethics Advisory Op. 98-02 (April 17, 1998). In the event of a conflict on a particular matter, however, the attorney may not represent both unless he or she can comply with Rule 1.7(a)–(b). *Id.*

Plenty of attorneys represent multiple cities and counties. But attorneys must be wary of potential conflicts that could arise between those clients and be careful to address them as required by the Rules.

### How Will the Attorney's Representation of a Government Entity Affect Her Representation of Private Clients?

With many rural communities, Utah has a number of lawyers who are part-time government lawyers. Aside from the internal conflicts that can arise within a single government entity, the standard conflict rules created by Rule 1.7 apply to attorneys simultaneously representing government entities and private parties. *See* Utah R. Prof'l Conduct 1.7. The attorney may not represent clients directly adverse to his government client. *Id.* The attorney may not accept any representation that would "materially limit[]" the attorney's efforts on behalf of the government. *Id.* 1.7(a). For example, a part-time town attorney could not also represent a criminal defendant if town police officers will be prosecuting witnesses against that defendant.

Rule 1.11 creates special conflict of interest rules for attorneys moving in or out of government service. *Id.* 1.11. A current government attorney may not participate in matters in which the attorney "participated personally and substantially while in private practice" without government consent. *Id.* 1.11(d)(2)(i). The same rule applies in reverse for an attorney who previously represented a government; without consent, that attorney may not represent a private party on a matter in which the attorney participated "personally and substantially" while representing the government. *Id.* 1.11(a)(2). For example, an attorney who advised the city zoning administrator on a particular zoning decision could probably not represent a private party in litigation against the city about that zoning decision.

Some statutes define additional parameters for part-time government lawyers engaging in private practice. The Utah Code prohibits county and district attorneys from representing criminal defendants in any jurisdiction. A county or district attorney may not prosecute or dismiss a case in which he or she has previously acted as counsel for the accused. Utah Code Ann. § 17-18a-605.

The Utah State Bar Ethics Advisory Committee has issued a number of opinions that provide additional guidance on questions surrounding public and private representation. The following opinions are of interest:

- A part-time county attorney or deputy county attorney may not appear as counsel for a defendant in a civil action brought in the county by the State of Utah to collect delinquent child support payments. Utah State Bar Ethics Advisory Op. 89-99 (October 27, 1989).
- A private attorney who has been appointed as a special deputy county attorney to investigate and prosecute a single criminal matter may not continue to represent any criminal defendants in any jurisdiction. Utah State Bar Ethics Advisory Op. 98-04 (Apr. 17, 1998).
- A city attorney with prosecutorial functions may not represent a criminal defendant in any jurisdiction. Utah State Bar Ethics Advisory Op. 126 (Jan. 27, 1994).
- A city attorney with no prosecutorial functions, who has been appointed as city attorney pursuant to statute, may not represent a criminal defendant in that city, but may represent a criminal defendant in other jurisdictions, provided he satisfies Rule 1.7(a). *Id.*

- An attorney with no prosecutorial functions, who is retained by a city on a contract or retainer basis, may represent a criminal defendant in any jurisdiction, if Rule 1.7(a) is satisfied. *Id.*

- A part-time county attorney is not per se prohibited from representing a private client in a protective order hearing. Utah State Bar Ethics Advisory Op. 01-06A (June 12, 2002). However, strict rules of informed consent and waiver apply, and the attorney will be required to withdraw if the client becomes a criminal defendant. *Id.*

- A city attorney with prosecutorial functions may represent a defendant in a civil contempt proceeding, provided the city is not a party to the proceeding. Utah State Bar Ethics Advisory Op. 95-03 (Apr. 28, 1995).

- Members of a county attorney's office may provide pro bono legal assistance to victims of domestic violence seeking protective orders. However, the individual attorney providing the assistance cannot be involved in a subsequent prosecution of the abuser. A different attorney in the county attorney's office may be able to prosecute the abuser, provided there is appropriate screening. Utah State Bar Ethics Advisory Op. 06-01 (June 2, 2006).

- An attorney who is a partner or associate of a city attorney may not represent a criminal defendant in any situation where the city attorney is prohibited from doing so. Utah State Bar Ethics Advisory Op. 126 (Jan. 27, 1994).

- A lawyer may represent criminal defendants in the same judicial district in which a law partner sits as a justice court judge, but the lawyer may not appear before the partner. Utah State Bar Ethics Advisory Op. 95-02A (Jan. 26, 1996).

- Generally, a former government attorney is not prohibited from representing a private client in matters that involve the interpretation or application of laws, rules or ordinances directly pertaining to the attorney's employment with a government agency. Utah State Bar Ethics Advisory Op. 97-08 (July 2, 1997). However, the attorney may not represent such a client where the representation involves that same lawsuit, the same issue of fact, or conduct on which the attorney participated personally and substantially on behalf of the government agency. *Id.*

- A Utah prosecuting attorney acting as a private practitioner should avoid engaging in a civil action that involves parties and facts that have been or become subject of a criminal investigation within the prosecutor's jurisdiction. An attorney already involved in a civil matter in which a party becomes a potential criminal defendant need not withdraw if he refers the criminal matter to a conflicts attorney and stays out of the criminal matter. Utah State Bar Ethics Advisory Op. 98-01 (Jan. 23, 1998).

- An Attorney General who formally sat on a nonprofit board (the Bid Committee for the 2002 Olympic winter games), but did not act as the board's attorney and did not have "substantial participation" on a personal, non-attorney basis could undertake an investigation of possible criminal activity by the board. Utah State Bar Ethics Advisory Op. 99-05 (July 30, 1999).

- It is not per se unethical for an elected county attorney to share and rent office space to another private attorney who may represent interests adverse to the county, but special precautions must be taken, and sharing a secretary is not advised. Utah State Bar Ethics Advisory Op. 125 (Oct. 28, 1994).

### Do the Rules of Professional Conduct Pertaining to Dishonesty, Fraud and Deceit Apply to Government Lawyers?

Yes, of course they do. But perhaps surprisingly, there are exceptions. A government lawyer who participates in a lawful covert government operation that entails conduct employing dishonesty, fraud, misrepresentation or deceit for purposes of gathering relevant information does not, without more, violate the Rules of Professional Conduct. Utah State Bar Ethics Advisory Op. 02-05 (March 18, 2002). This should protect, for example, an attorney who works for a state or federal agency that performs undercover investigative work directed against criminal and terrorist groups.

### Conclusion

Government lawyers face a host of ethical issues not common in private practice. Fortunately, the rules and relevant ethics opinions include specific provisions and guidance that allow significant leeway for government practitioners in some contexts. Unfortunately, the boundaries of ethical conduct and restraint are often far from clear. Advice that is often given in private practice applies with even greater force to government lawyers: Study the relevant rules, always strive to exercise good faith, don't ever act in a vacuum, and get help and advice from trustworthy peers and mentors.

***Author's Note:*** *The author expresses thanks for the contributions of Chris McLaughlin, J.D., Associate Professor of Public Law and Government at the University of North Carolina. Mr. McLaughlin is a contributing author to an excellent blog focused on Local Government Law in North Carolina, including several outstanding pieces on ethics for the local government attorney. You can view this blog at* https://canons.sog.unc.edu/. *Many of Mr. McLaughlin's ideas have been included in this article with permission.*