

Article

Licensed Paralegal Practitioners*

by Catherine J. Dupont

I had an interesting cab ride from the St. George Airport to the Utah State Bar's Spring Convention. When Carol, the cabbie, heard that I work for the state courts she told me about her recent experience with a legal issue and shared her opinion that there is no justice in the legal system. She won her case, but she found the experience overwhelming and expensive. Carol is not alone. Utah's 2017 court records reveal that in family law cases 69% of respondents and 56% of petitioners were self-represented. In eviction cases and debt collection cases the numbers are even worse – more than 95% and 98% of respondents, respectively, were self-represented.

The alarming number of people navigating the legal system without representation contributes to the perception that the legal system is stacked against a person who cannot afford an attorney. The Utah Supreme Court and the Utah State Bar are dedicated to addressing barriers to legal representation through innovative projects designed to improve access to the courts. One of those projects is the creation of a new profession: Licensed Paralegal Practitioner (LPP). This spring, Utah's Supreme Court approved final rules to create and regulate LPPs as part of the practice of law, making Utah the second state in the nation to establish a license to practice law outside of a traditional law degree in designated practice areas and within a limited scope of service.

How Did the Utah Supreme Court and the Utah State Bar Develop the LPP Program?

The idea to create a market-based solution for the unmet needs of litigants started with a task force created by the Utah Supreme Court in May 2015. The recommendations of that task force were then assigned to the LPP Steering Committee, which has met frequently over the past year. The LPP Steering Committee's composition is broad, including judges from the trial and appellate courts, practitioners in each of the substantive law areas in which an LPP may practice, paralegals, representatives of colleges and universities with legal studies programs, the Dean of the University of Utah law school and a representative from BYU's law school, a former state senator, a consumer protection representative, Utah State Bar staff, and several public members. The LPP Steering Committee created working groups to develop education criteria, licensing requirements,

and rules of professional conduct. The working groups also met frequently over the last year and involved various stakeholders who could help with each group's specific task. The LPP Steering Committee's work has been deliberative and subject to approval by the Utah Supreme Court and the Judicial Council.

What is the LPP Limited Scope of Service?

Rule 14-802 of the Rules Governing the Utah State Bar creates an exception to the authorization to practice law for an LPP. The exception permits an LPP to assist a client only in the practice areas for which the LPP is licensed. The rule limits an LPP's possible practice areas to:

- Specific family law matters, such as temporary separation, divorce, parentage, cohabitant abuse, civil stalking, custody and support, or name change;
- Forcible entry and detainer; and
- Debt collection matters in which the dollar amount at issue does not exceed the statutory limit for small claims cases.

Rule 14-802 also enumerates permissible actions for LPPs within the practice areas. Under this rule, an LPP may:

- Enter into a contractual relationship with a natural person (LPPs cannot represent corporations);
- Interview a client to determine the client's needs and goals;
- Assist a client with completing approved forms and obtaining documents to support those forms;

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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.*