

Ethics Advisory Opinion Committee
Opinion No. 19-02
Issued March 8, 2019

ISSUE

1. Is it permissible for a private lawyer to represent a client against a government department or agency and simultaneously represent a different department or agency of the same government in an unrelated matter?

OPINION

2. Possibly. Whether a conflict exists under Rule 1.7 of the Utah Rules of Professional Conduct (“URPC”) hinges on the identity of the government client and the nature of the representation. The answer to this question will vary based on the specific facts of a particular case.

3. Government clients are treated like organizational clients under Rule 1.13 of the Utah Rules of Professional Conduct. However, lawyers representing government clients may have expanded duties under relevant law. *See* URPC Rule 1.13(h). Government clients should be clearly identified at the outset of the representation. While clients control the scope of the representation, the client’s autonomy with respect to his identity must be viewed through the lens of Rule 1.7 of the Utah Rules of Professional Conduct. A lawyer may not ignore potential conflicts under Rule 1.7 by virtue of a narrow definition of the government client.

BACKGROUND

4. A lawyer may represent third parties against a specific government’s department or agency and simultaneously be asked to represent a different department or agency of the same

government.¹ The representation against the government department or agency and the representation of the government client involve unrelated departments, agencies, and issues. For example, Partner A represents a criminal defendant–appellant against the Attorney General’s office while Partner B is asked to represent the Department of Health in negotiating waivers for Medicaid coverage with the federal government.

ANALYSIS

5. Rule 13(h) regarding representations of entities states that “a lawyer . . . employed to represent a governmental entity shall be considered . . . as representing an organization. The government lawyer’s client is the governmental entity”² URPC Rule 13(h).

6. A lawyer representing government clients should have a clear understanding of the identity of his client. Generally, clients control the scope of a lawyer’s representation. URPC Rule 1.2. However, the Committee notes that it may be more difficult to precisely identify the client within the governmental context. *See* URPC Rule 1.13 cmt. 13a. Ideally, the identity of the government client and scope of the representation will be clearly addressed in writing at the outset of the representation. If the government client has not been clearly identified, a functional analysis of the reasonable understandings and expectations of the lawyer and government entity (acting through its authorized representatives) should be employed.

¹ Rule 1.10 of the Utah Rules of Professional Conduct governs the imputation of conflicts of interest for a private firm. If Rule 1.7 prohibits one lawyer from representing a client, that prohibition is imputed to each lawyer associated in the firm as described in Rule 1.10.

² Comment 13a to Rule 1.13 states, in pertinent part: “The duties defined in this rule apply to government lawyers . . . except to the extent the responsibilities of the government lawyers are otherwise controlled by the duties imposed upon them by law. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context”

7. A functional analysis should include, but is not limited to: the legal definition of the government client, how the government client is funded, the government client's level of autonomy with respect to the specific issue for which the lawyer has been retained, and the general importance of the matter to other departments of the government entity or the government as a whole. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 97-405, "Conflicts in Representing Government Entities" (Apr. 19, 1997) (citing D.C. Bar, Legal Ethics Comm. Op. 268 (1996)) (the "**ABA Opinion**").

8. Additionally, the identity of the government client must be viewed through the lens of Rule 1.7 of the Utah Rules of Professional Conduct. The lawyer must assure himself that:

the definition of the government client ultimately arrived at in discussions with authorized government officials both recognizes and respects [his] private clients' right to object when their lawyer proposes to represent interests directly adverse to their own. [His] government client has the same right to object to any potentially conflicting private representations.

ABA Opinion. If after the functional analysis, there is still uncertainty as to the identity of the government client, it should be resolved in favor of disclosing the potential conflict(s) to both the government and private clients consistent with Rule 1.7.

CONCLUSION

9. The simultaneous representation described above is not specifically prohibited by the rules, but lawyers engaged in this practice must be aware of the increased potential for a conflict as defined by Rule 1.7. Therefore, the Utah Rules of Professional Conduct do not preclude the simultaneous representation of government and private clients against separate departments or agencies of the same government. However, lawyers engaged in this practice should exercise constant awareness of their responsibilities to their government clients, their private clients, and the public interest.