

15-01

Opinion No. 15-01

Utah Ethics Opinion

Utah State Bar Ethics Advisory Opinion Committee

January 13, 2015

ISSUE

1. The Utah Board of Pardons and Parole (the "Board") and a private attorney have jointly requested the Ethics Advisory Opinion Committee issue an opinion on what constitutes a "matter" as discussed in Utah Rules of Professional Conduct 1.11(a)(2) and 1.12(a). Specifically, in light of the nature of Board proceedings, do all decisions involving an individual offender constitute the same "matter" for purposes of Rule 1.11(a)(2) and 1.12(a)? What are the limitations on a former member of the Board or hearing officer in representing offenders before the Board?

OPINION

2. A former member of the Board (or hearing officer) may not represent an offender before the Board without the informed written consent of the Board where the former Board member (or hearing officer) personally and substantially participated in prior Board proceedings involving the same offender. However, the specific facts and circumstances of the subsequent representation, including, without limitation, the lapse of time between the two Board proceedings and nature of the offenses involved, may often provide a basis for the Board to waive any potential conflict in such a situation.

BACKGROUND [1]

3. The Board is an administrative agency of the Executive Department created by the Utah Constitution. Utah Const. Art 7, § 12. The Board is charged with determining "when and under what conditions, subject to this chapter and other laws of the state, persons committed to serve sentences in Class A misdemeanor cases at penal or correctional facilities which are under the jurisdiction of the Department of Corrections, and all felony cases except treason or impeachment or as otherwise limited by law, may be released upon parole, pardoned, ordered to pay restitution, or have their fines, forfeitures, or restitution remitted, or their sentences commuted or terminated." Utah Code Ann. § 77-27-5(l)(a). In addition to the constitutional and

statutory bases for its authority, the Board is also governed by its own rules under the Utah Administrative Code, Section R671, *et seq.* Currently, the Board is made up of a five-member panel who, by majority vote, make the aforementioned decisions. Additionally, the Board employs a number of hearing officers who assist the Board by conducting hearings and writing recommendations utilized in the Board's decision-making process. When hearing officers or Board members write recommendations, those recommendations are not available to individuals outside of the Board and its employees, including the offender. [2] The recommendations are classified as "protected" or as "non records," pursuant to GRAMA. Additionally, the votes of individual members attached to these recommendations are not released to the offender or others. Board members and employees may not remove material from the files or retain photocopies of the information.

4. When an offender is first convicted of a Class A misdemeanor or felony and committed to the custody of the Department of Corrections, the Board opens a file on that offender. That file contains all of the records the Board possesses on the offender, including the offender's criminal history, supervision history, and records pertaining to that offender provided by the Department of Corrections. The Board opens only one file on each offender. If an offender commits new offenses, is released on parole, etc., this additional information is added to the existing file. When the Board makes a decision regarding an offender, it considers the entire file. For example, the Board will consider previous convictions, even those that have terminated, and previous paroles in making a current decision regarding an offender. Of particular import, the Board member and/ or hearing officer participating in a particular decision in an offender's case has access to the confidential intra-Board memoranda containing recommendations and individual votes of each member regarding previous decisions. Further, the Board and hearing officers are able to access any other confidential information contained in the file, including information from confidential informants, etc. As necessary, Board members or hearing officers are occasionally recused from participating in any part of the decision-making process associated with a particular offender's case. Once recused, the Board member or hearing officer is prohibited from accessing the offender's file and participating in any future decisions regarding the offender.

5. Though the number varies somewhat from year to year, the Board currently makes approximately 11,000 decisions per year. Not every Board member votes on every decision. Instead, the file circulates from member to member until a majority vote is reached. Therefore, each Board member

votes on approximately 7,000 to 8,000 matters per year. In some cases, the Board will take multiple actions on an offender in a given year. Other offenders may not appear before the Board at all in a year. [3]

ANALYSIS

6. Currently, there are former Board members [4]who act as counsel for offenders in proceedings before the Board. Pursuant to Utah Rules of Professional Conduct:

"a lawyer who has formerly served as a public officer or employee of the government. . .shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation."Rule 11(a)(2). [5]

"[A]s used in this Rule, the term 'matter' includes: (e)(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and (e)(2) any other matter covered by the conflict of interest rules of the appropriate government agency."Rule 1.11(e).

Similarly, Rule 1.12(a) provides:

"[e]xcept as stated in paragraph (d) and in Rule 2.4(c), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person, or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent."

The Board's rule is substantively identical. Section R671-103-l(3).

7. Both Rules 1.11 (a)(2) and 1.12(a) apply as the former Board member is a lawyer who formerly served as a public officer or employee of the government (Rule 1.11) and was an adjudicative officer for the Board (Rule 1.12). Hence, the former Board member cannot appear as counsel in the same "matter" in which he participated personally and substantially as a Board member.

8. The Committee concludes that any proceeding involving the same offender is the same "matter" for purposes of Rules 1.11(a)(2) and 1.12(a) for the following reasons. First, the Board uses the same file and reviews all material on the individual offender each time the offender appears before the Board. A Board member who previously voted in an offender's case would have had access to and would have reviewed the confidential information in an offender's file, including the individual votes of the members of the Board

on previous decisions. A former Board member would likely be at an advantage, having been privy to information about the offender now-client not available to the public or even to the offender. [6]This situation appears to the Committee to be squarely addressed in the comments to Rule 1.11, which provide in relevant part:

"[p]aragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client." Comment 3.

[T]he risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. Comment 4.

9. Second, the Board's policy and practice has been to treat each offender as one "matter" or case. For example, if a Board member or employee must recuse himself/herself from a case, that Board member or employee may not participate in any other decisions regarding that offender, regardless of whether the member/employee's conflict arose during a now-terminated term of incarceration. This position seems to fit squarely within Rule 1.11(e)(2) which permits an administrative agency to establish its own conflict of interest rules-at least for matters involving the representation of a person before the agency. The Board's policy of considering the same offender to be one "matter" in all proceedings before the Board does not appear to be irrational or unreasonable given how the Board functions. [7]

10. Third, judicial interpretations of "matter" in Rules 1.11 and 1.12, in the context of motions to disqualify counsel, have relied upon a common factual nexus and the access to confidential information from the first participation that would be relevant in the subsequent representation. In *Archuleta v. Turley* 904 F. Supp. 2d 1185 (D. Utah, 2012) a former judicial law clerk who handled state habeas corpus proceedings on a death row inmate was disqualified from representing the state in federal habeas corpus proceedings against that inmate. In disqualifying the former judicial clerk, the court reasoned that he "had been privy to judicial thinking about Mr. Archuleta's case" and "also had access to sealed ex parte filings and other confidential information" in the case. *Archuleta* 904 F. Supp. 2d at 1192. In *Poly Software International v. 5w,880* F. Supp. 1487 (D. Utah 1995), written before Rule 1.12 expressly covered mediators, the District Court disqualified a party's attorney

who had previously served as a mediator where he obtained confidential information that gave him an unfair advantage in the second factually related case. The Committee's Opinion here is consistent with the decisions to disqualify attorneys in those two cases.

11. The Committee recognizes that an offender may come back before the Board due to a new criminal case or the revocation of his parole. In those instances, the new case or circumstances surrounding the parole revocation would typically involve factually new and different issues so that the former Board member's prior access to confidential information might have little bearing upon the new case. However, the Board's conflict policy is based on its determination that parole decisions are not limited to the consideration of new facts. Instead, the Board considers the offender's entire file and may rely upon confidential materials in the file that had been available to the former Board member.

12. The parties requesting this opinion agree that the passage of time and the volume of cases make it highly unlikely that a former Board member would remember confidential information about all the cases in which he participated. However, as noted in *Archuleta*, "[r]ule 1.12 and Rule 1.11 do not say anything about a matter being limited by time. . . , nor would the underlying rationale for either rule be protected if they did. The prohibition of Rule 1.11 and Rule 1.12 against subsequent representation of a client in a matter that the lawyer worked on as a government lawyer, or as a judge or a law clerk, 'flows from the same public policy imperative of preventing the abuse of public office or appointment.'" 904 F.Supp. 2d at 1190 (citations omitted). Nor, in applying its own conflict rules, should the Board have to guess what a former Board member or employee knows or remembers, or have to parse through the file to determine whether or not a former Board member or employee may have confidential information to use for the benefit of his/her new client *Archuleta*, 904 F. Supp. 2d at 1193.

13. The facts and circumstances of a particular case, the Committee believes, are more appropriately addressed in the Board's decision to waive any potential conflict rather than a wholesale determination that such conflict is not established by the Utah Rules of Professional Conduct and the Board's own conflict of interest rules.

14. Under all the circumstances, the Committee concludes that a former Board member or hearing officer is prohibited under Rules 1.11 and 1.12 from appearing before the Board to represent an offender where he/she personally and substantially participated, as a Board member or hearing officer, in prior proceedings involving the same offender, unless the Board and the offender give informed consent, confirmed in writing, to the former Board member's

representation.

Notes:

[1]The Committee was greatly aided by the thorough and detailed joint memorandum provided by the parties. To a large extent, the factual background and legal analysis from the joint memorandum have been incorporated herein.

[2]Most other records in an offender's file are available to the offender. See Section R671-303-1.

[3]Given the number of decisions each Board member participates in and the fact that Board members cannot retain material from offenders' files, the private attorney argues it would be impossible to remember specifics about each case or how an individual member voted, and contends that is a major reason why the Board does not start a new file for an offender upon each new period of commitment. The Board agrees that members are not likely to remember every case or decision. However, Board members report that they remember specifics of many cases, especially those that were exceptional in some way and/or those where they voted on multiple matters. It is reasonable to assume that members would be more likely to remember more recent cases or decisions than those that are more attenuated in time.

[4]There are also current and former Board employees, including hearing officers, who are members of the Bar. In the future, those individuals could also, conceivably, represent clients in front of the Board.

[5]This rule is nearly identical to the Board's own conflict of interest rule. See Section R671-103-l(4).

[6]This refers to confidential information that was contained in the file during the former Board member/employee's tenure with the Board. The former Board member would not have access to confidential material that was added to the file after that individual left the Board.

[7]While the Board's conflict rule does not explicitly state that all proceedings involving the same offender are considered the same "matter," its policy and practice applies its rule in that manner. The Board has advised the Committee that it is in the process of writing more specific administrative rules regarding this issue and others.
