Memorandum

To: Supreme Court Advisory Committee on the Rules of Professional Conduct

From: Paula K. Smith

Re: Charles M. Bennett's Request To Change the Cross Reference in Comment [2a] to Rule 5.4

Date: June 27, 2005

On page 11 of his letter dated May 4, 2005, Mr. Bennett indicates that the cross reference in comment [2a] to Rule 5.4 needs to be changed from 7.2(c) to 7.2(b). Mr. Bennett is correct.

Rule 5.4 deals with the professional independence of a lawyer. The proposed changes in Utah Rule 5.4 concern the purchase of the practice of a deceased, disabled or disappeared lawyer set out in (a)(2)(i).

Comment [2a] of the proposed Rule 5.4 states as follows: "Paragraph 4 of the ABA Model Rule was not adopted because it is inconsistent with the provisions of Rule 7.2(c), which prohibits the sharing of attorney's fees."

Paragraph 4 of the ABA Model Rule allows lawyers to share court-ordered legal fees with "a nonprofit organization that employed, retained, or recommended the employment of the lawyer in the matter."

Proposed Rule 7.2(c) states that "[a]ny communication made pursuant to this Rule shall include the name and office address of at least one lawyer of the firm responsible for its content." Proposed Rule 7.2(b) prohibits a lawyer from giving anything of value to a person recommending his services, except for specified exceptions such as paying the usual charges of a legal service plan.

Thus, Mr. Bennett is correct in stating that the correct cross reference should be 7.2(b), not 7.2(c). I also think that the reference to Paragraph 4 should be Paragraph (a)(4) and "prohibits" should be "prohibit." Therefore, Rule 5.4 comment [2a] should read as follows:

"Paragraph (a)(4) of the ABA Model Rule was not adopted because it is inconsistent with the provisions of Rule 7.2(b), which prohibit the sharing of attorney's fees."

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May 4, 2005

Timothy Shea
By email

Re: The Proposed Utah Rules of Professional Conduct
Comments of Charles M. Bennett

Dear Tim:

I am writing with my recommendations concerning the proposed revisions to the Utah Rules of Professional Conduct (URPC). I have attached a copy of my resume to my email so that you can see that I have had substantial experience regarding the application of the Model Rules of Professional Conduct to lawyers practicing as trust and estate lawyers. I think my comments, though lengthy, will be of assistance to the Supreme Court in finalizing the revised Utah Rules of Professional Conduct.

1. Restricting a Lawyer's Ability to be Disloyal to a Client. I believe the amendments to the URPC should make clear that a lawyer may not use confidential information to a client's disadvantage except under the specific circumstances set forth in proposed Rule 1.6(b) or with the client's informed consent. I propose changes to Rule 1.6(a), Rule 1.8(b), Rule 1.2(a) and Rule 1.9(c) to effectuate this recommendation.

Current Rule: Under the current Utah Rules of Professional Conduct (URPC), a lawyer is not impliedly authorized to take any action to the disadvantage of a client. In Rule 1.6(a), Utah deleted the phrase "unless . . . the disclosure is impliedly authorized in order to carry out the representation . . .." Arguably, a Utah lawyer must have an express authorization in all cases. Furthermore in Rule 1.8 (b) (regarding not using "information relating to the representation . . . to the disadvantage of the client"), Utah deleted the last phrase of the Model Rules of Professional Conduct (MRPC) Rule 1.8(b) that provided "except as permitted or required by these Rules." Given that the URPC had deleted the implied authorization provision in Rule 1.6(a) and the

Recommendations Regarding Rule 1.6(a)

In addition to this change, Rule 1.6(a) could be changed by adding after the phrase "in order to carry out the representation", this phrase "to the client's advantage." While not technically necessary, I think it is better to have the point made in both places. In addition, I think this change needs to be made to proposed Rule 1.2(a).

Recommendation Regarding Rule 1.2(a)

Please note also that the new version of MRPC Rule 1.2(a) includes a statement that lawyers are "impliedly authorized to take . . . actions . . . in order to carry out the representation." Consistent with my recommendations regarding Rules 1.6(a) and 1.8(b), I recommend this also be changed by adding the phrase "to the client's advantage" after the word "representation."

Recommendation Regarding Rule 1.9(c)

Rule 1.9(c) provides:

> A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> > (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
> >
> > (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Consistent with Rule 1.8(b), I would suggest these changes:

> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> > (c)(1) use information relating to the representation to the disadvantage of the former client except when the lawyer is required to disclose information relating to the representation of the former client under these rules, when the lawyer is permitted to

> disclose the former client's confidential information under Rule 1.6(b), or when the lawyer has the former client's informed consent under Rule 1.6(a); or
>
> (c)(2) reveal information relating to the representation except when the lawyer is required to disclose information relating to the representation of the former client under these rules, when the lawyer is permitted to disclose confidential information regarding the former client under Rule 1.6(b), or when the lawyer has the former client's informed consent under Rule 1.6(a).
>
> (c)(3) This subsection (c) does not prohibit the disclosure of information that has become generally known.

Special Note re Oxendine v. Overturf

In *Oxendine v. Overturf*, the Utah Supreme Court ruled that a lawyer representing a personal representative in a wrongful death action normally has a duty of care to the statutory heirs of the wrongful death action as intended third party beneficiaries of the contract between the lawyer and the personal representative. 1999 UT 4 (1999), ¶¶ 12-16. A lawyer for a fiduciary in such cases could have a need to disclose fiduciary misconduct to fulfill the lawyer's duty to the statutory heirs. In those circumstances, the lawyer's disclosure would be authorized under Rule 1.6(b)(6) (provided the language is changed back to the MRPC language; *see* my comments in paragraph 4 below). The lawyer may also be authorized to make a disclosure in those circumstances under Rule 1.6(b)(5) (to establish a defense to a civil claim against the lawyer involving the representation of the client).

Conclusion

Please excuse the lengthy explanation. If you feel it was not necessary, I apologize. I hope the reasoning behin my recommendation is helpful.

2. Keeping the $750 threshold Activating the Requirement for Written Statements Concerning Fees.

I also request that the changes to Rule 1.5 that eliminated the $750 threshold be reexamined and the threshold be reinstated.

As a member of ACTEC's Professional Responsibility Committee, I have listened to

~~Rule 1.9. Conflict of interest: Former client.~~Rule 1.9. Duties to Former Clients.

(a) A lawyer who has formerly represented a client in a matter shall not thereafter~~:~~

~~(a) Represent~~ represent another person in the same or a substantially ~~factually~~ related matter in which that person's interests are materially adverse to the interests of the former client unless the former client ~~consents after consultation; or~~ gives informed consent, confirmed in writing.

(b) ~~Use~~ A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(b)(1) whose interests are materially adverse to that person; and

(b)(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(c)(1) use information relating to the representation to the disadvantage of the former client except as ~~Rule 1.6~~ these Rules would permit or require with respect to a client, or when the information has become generally known; or

(c)(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Comment

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. ~~The principles in Rule 1.7 determine whether the interests of the present and former client are adverse. Thus,~~ Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the

clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this Rule ~~1.9(a) may depend~~ depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a ~~wholly~~ factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military ~~jurisdiction~~ jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational

client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).

~~Information~~ [8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about ~~the~~ that client when later representing another client.

~~Disqualification from subsequent representation is~~ [9] The provisions of this Rule are for the protection of former clients and can be waived ~~by them. A waiver is effective only if there is disclosure of the circumstances, including the lawyer's intended role in behalf of the new client.~~

~~With regard to an opposing party's raising a question of conflict of interest~~ if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(e). With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

~~[CODE COMPARISON~~

~~There was no counterpart to paragraphs (a) and (b) in the Disciplinary Rules of the Code. The problem addressed in paragraph (a) was sometimes dealt with under the rubric of Canon 9 of the Code, which provided: "A lawyer should avoid even the~~

~~appearance of impropriety." EC 4-6 stated that the "obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment."~~

~~The provision in paragraph (a) for waiver by the former client is similar to DR 5-105(C).~~

~~The exception in the last sentence of paragraph (b) permits a lawyer to use information relating to a former client that is in the "public domain," a use that was not prohibited by the Code, which protected only "confidences and secrets." Since the scope of paragraph (a) is much broader than "confidences and secrets," it is necessary under the Rules to define when a lawyer may make use of information about a client after the client-lawyer relationship has terminated.~~]

MEMORANDUM

TO: Supreme Court Advisory Committee on the Rules of Professional Conduct

FROM: Honorable Stephen Roth
Steven G. Johnson

RE: Comments on Rules 1.13 and 1.8, Rules of Professional Conduct

DATE: July 8, 2005

RULE 1.13

The Utah State Legislature and its attorneys expressed concern that the proposed Rules of Professional Conduct ("RPC") as drafted (particularly Rules 1.7 and 1.13) make it impossible for the legislative counsel to meet their obligations to the legislature without violating the RPC.

Legislative counsel noted that they are subject to legislative direction pursuant to Article VI, Sec. 32(2) of the Utah Constitution, which provides:

> The Legislature may appoint legal counsel which shall provide and control all legal services for the legislature unless otherwise provided by statute.

This constitutional provision provides that the legislative counsel is to provide legal services for the Legislature. Thus, the Legislature is the client. Legislative counsel is accordingly governed by Rule 1.13 of the RPC, Organization as a Client. Under Rule 1.13, a lawyer for an organization represents the organization (in this case, the Legislature as a whole) acting through its duly authorized constituents (which could be individual legislators, committees, etc.)

In a corporation or other business entity the individual constituents often disagree, sometimes even sharply. Counsel for the organization may be asked by one constituent such as a board member or officer to draft a resolution or a contract. The same legal counsel could then be asked by a different constituent such as a different board member to draft an opposing resolution or contract. This situation does not give rise to a Rule 1.7 or Rule 1.13 impermissible conflict. The lawyer does not represent the individual constituents in their individual capacities, but represents the entity as a whole. At some time, when the board of directors votes on the issue, then the entity has spoken. The lawyer represents the entity as a whole as it implements the decision.

Likewise, unless a statute provides otherwise, a lawyer for a governmental organization such as the Legislature represents the organization, and not the individual constituents such as the individual legislators in their individual capacities. The lawyer for a city represents the city, and not the individual city council members or the mayor in their individual capacities. Giving legal advice to the organization's constituents as they act in their capacities as constituents of the organization, even if the advice may be opposed to the advice given to another constituent, does not violate these Rules. The client is not the individual constituents, but the organization as a whole.

The Utah Supreme Court has considered this issue in the case of Salt Lake County Commission vs. Salt Lake County Attorney, Douglas R. Short, 985 P. 2d 899 (UT 1999). In the Short case, the Supreme Court was requested to help resolve outstanding issues

between the Salt Lake County Commission ad the Salt Lake County Attorney over their relative roles in the Salt Lake County Government. The trial court ruled that the County Attorney is the legal advisor for the county, to the county commission, and to each individual commissioner, basing its decision in part on the statutory language in §17-18-1.5(b), Utah Code Annotate (1953, as amended). This section requires the county attorney to give an opinion in writing to the county, district, precinct and prosecution district officers on matters relating to the duties of their respective offices.

The Supreme Court reversed on this issue. Quoting from Rule 1.13, the Court stated that an elected attorney represents the entity, "except as the representation or duties are otherwise required by law." The Court noted that the statutes are consistent with the general rule of Rule 1.13 that the attorney-client relationship is between the entity (viz. the county), represented by its agents (viz. the board of county commissioners) and the attorney (viz. the county attorney). The Court held that the county attorney has an attorney-client relationship only with the county as an entity, and not with the commission or the individual commissioners apart from the entity on behalf of which they act.

In the same way, legislative counsel have an attorney-client relationship with the Legislature as an entity, and not with the Speaker, President or any individual legislators apart from the entity on behalf of which they act, unless there is a statute which provides otherwise.

As in the Short case, one must look to see if there are any statutes that alter the relationship of legislative counsel to the Legislature or add duties beyond those set out in the RPC. Legislative counsel refers to Utah Code Annotated §36-12-12(2)(e):

> (2) The powers, functions and duties of the Office of Legislative Research and General Counsel . . . shall be:
>
> * * *
>
> (e)(i) to exercise under the direction of the general counsel the constitutional authority provided in Article VI, Sec. 32, Utah Constitution, in serving as legal counsel to the Legislature, majority and minority leadership of the House or Senate, any of the Legislature's committees or subcommittees, individual legislators, any of the Legislature's staff offices, or any of the legislative staff; and
>
> (ii) to represent the Legislature, majority and minority leadership of the House or Senate, any of the legislative committees or subcommittees, individual legislators, any of the legislature's staff offices, or any of the legislative staff in cases and controversies before the courts and administrative agencies and tribunals . . ..

Although this statute provides that the legislative counsel represents "individual legislators" as well as other legislative constituents, it is subject to the constitutional provision that legislative counsel represents the Legislature as a whole, acting through its legislators and other constituents. Legislative counsel does not represent individual legislators in their individual capacities. Legislative counsel would not represent the individual legislators in criminal cases, divorce cases, breach of contract cases, or personal bankruptcy cases, nor would legislative counsel provide estate planning, real property sales transactions or income tax preparation services to the legislators. The scope of the duty of legislative counsel is to represent the legislators only when they are

acting in their capacity as constituents of the legislature. Legislative counsel, as provided in the Constitution, provides legal services "for the legislature." Article VI, Sec. 32(2).

Similar to the county attorney in the Short case, this statute does not change the general rule that legislative counsel represents the legislature as an entity. Thus there is no conflict of interest when, for example, legislative counsel prepares a bill for one legislator, and then an amendment to that bill for another legislator, even where the amendment essentially eviscerates the original bill. These acts, although they seem to create a conflict between the interests of the two legislators, do not create a conflict with the Legislature, which is the actual client. These acts merely further the purposes of the Legislature-client by assisting to bring forward views and ideas which, by the vote of the Legislature (and the signature of the Governor) then become the law.

The Office of Legislative Counsel recommended that language be added to the Comments to Rule 1.13 as a new Comment 13(b):

> [13b] When the client is a governmental legislative body (such as the Utah Legislature, a city council, a county council or commission), a lawyer representing that legislative body may concurrently represent the interests of the majority and minority leadership, members and members elect, committee members, and staff to the legislative body. In representing the legislative body and the various interests therein, the lawyer is considered to be representing one client and the rules relating to conflict of interest and required consent do not apply.

This language is overly broad by stating that "the rules relating to conflicts of interest and required consent do not apply" to a lawyer representing a legislative body. There are many instances where the conflict of interest rules should apply, and legislative general counsel in our discussions acknowledged this fact. To paint with this broad of a brush is problematic and unwise, and will only lead to situations where clients may be harmed.

Strictly speaking, it seems that the Rule and Comments as proposed by the Supreme Court are sufficient to overcome the concerns expressed by legislative counsel. Rule 1.13(h) clearly states that a "lawyer elected, appointed, retained, or employed to represent a governmental entity shall be considered for the purpose of this rule as *representing an organization.*" (Emphasis added.) The lawyer does not represent the constituents of that organization such as the individual legislators. Comment 2 states, "This does not mean, however, that constituents of an organizational client are the clients of the lawyer." Comment 13a states, "For example, *the government lawyer's client is generally the governmental entity itself*. . .." (Emphasis added.)

Notwithstanding this, there are some recommendations to improve the Comments to Rule 1.13 to make them more helpful in situations where the client is a legislative body. These recommendations are as follows:

1. Add back to Comment 13a after the first sentence, with some minor changes, a sentence which was deleted from the current Comment by the Committee. The ~~sentence currently reads, "A government lawyer following these legal duties in~~ good faith will not be considered in violation of the ethical ~~standards of this rule."~~ The sentence should be modified to read, "A government lawyer following the legal duties of this Rule in good faith will not be considered in violation of the ethical standards of this Rule."

2. The next sentence should be changed to read, "The ~~duty~~ duties defined in this Rule ~~applies~~ apply to government lawyers . . .."
3. The first part of the sentence which begins, "For example, the government lawyer's client is generally the governmental entity itself, but," should be deleted. In its stead should be inserted the following:

> Just as a lawyer representing a corporation also serves the corporation's officers, directors, employees, affiliates, subsidiaries, departments and other constituents, a lawyer for a governmental entity must also serve the entity's varying constituents. In serving those constituents, the governmental attorney is nonetheless considered to be representing one client, the governmental entity. For example, a lawyer in the Office of Legislative Counsel by statute represents the interests of the majority and minority leadership of the House or Senate, individual legislators, committee members, and legislative staff, among others. A lawyer in that office is nonetheless considered to represent one client, namely, the Legislature.

Copies of the recommended changes to Comment 13a (both as compared with the current Utah Comment and as compared with the published proposal), as well as a clean copy of the Comment, are attached.

RULE 1.8(i)

The committee has received an additional comment from Senator David L. Thomas regarding Rule 1.8(i). Copies of the materials are attached. After reviewing this comment, it is unclear to us the exact nature of the problem with which Senator Thomas has a concern. We have so far been unable to contact him to obtain further information about his concerns. Until we receive that clarification, it will be difficult to further review this matter.

It is hoped that someone on the Committee is in a better position to understand the concerns expressed by the Senator.

In light of our current lack of understanding of the issue involved, the subcommittee does not have a recommendation for the committee regarding Rule 1.8(i).

Comment 13a to Rule 1.13, Compared with Current Comment

Government Agency

[13a] Utah Rule 1.13, unlike the ABA Model Rule, contains paragraph (h), which deals with the relationship between government lawyers and the government entities they represent. ~~The duty defined by this rule applies to government lawyers, except to the extent the responsibilities of the government lawyers are otherwise controlled by the duties imposed upon them by law. A government lawyer following those legal duties in good faith will not be considered in violation of the ethical standards of this rule. The government lawyer's client is generally the governmental entity itself, but the client relationship may be further defined by statute, ordinance or other law. A lawyer for the government may have a legal duty to question~~ The duties defined in this Rule apply to governmental lawyers and lawyers in military service, except to the extent the responsibilities of the government lawyers are otherwise controlled by the duties imposed upon them by law. A government lawyer following those legal duties in good faith will not be considered in violation of the ethical standards of this rule. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Just as a lawyer representing a corporation also serves the corporation's officers, directors, employees, affiliates, subsidiaries, departments and other constituents, a lawyer for a governmental entity must also serve the entity's varying constituents. In serving those constituents, the governmental attorney is nonetheless considered to be representing one client, the governmental entity. For example, a lawyer in the Office of Legislative Counsel by statute represents the interests of the majority and minority leadership of the House or Senate, individual legislators, committee members, and legislative staff, among others. A lawyer in that office is nonetheless considered to represent one client, namely, the Legislature. The relationship between the government lawyer or lawyer in military service and the client may be further defined by statute, regulation, ordinance or other law. This rule does not limit that authority. ~~the conduct of government officials and perform additional remedial or corrective actions including investigation and prosecution. The lawyer may also have an obligation to divulge information to persons outside the government to respond to illegal or improper conduct of the organizational client or its constituents. The remedial option under paragraph (c) concerning resignation under Rule 1.16 may be inconsistent with the government lawyer's duties under the law. The obligation of the government lawyer may require representation of the public interest as that duty is specified by law.~~ In addition, a lawyer for the government may have a legal duty to question the conduct of government officials and perform additional remedial or corrective actions including investigation and prosecution. The lawyer may also have an obligation to divulge information to persons outside the government to respond to illegal or improper conduct of the organizational client or its constituents. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, where public business is involved. ~~The remedial option under paragraph (c) concerning resignation under Rule 1.16 may be inconsistent with the government lawyer's duties under the law.~~ The obligation of the government lawyer may require representation of the public interest as that duty is specified by law.

Comment 13a to Rule 1.13, Compared with the Proposed Comment

Government Agency

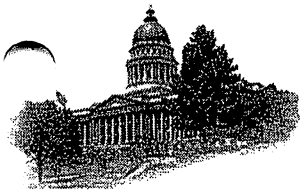
[13a] Utah Rule 1.13, unlike the ABA Model Rule, contains paragraph (h), which deals with the relationship between government lawyers and the government entities they represent. The ~~duty~~ duties defined in this Rule ~~applies~~ apply to government lawyers and lawyers in military service, except to the extent the responsibilities of the government lawyers are otherwise controlled by the duties imposed upon them by law. A government lawyer following those legal duties in good faith will not be considered in violation of the ethical standards of this rule. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. ~~For example, the government lawyer's client is generally the governmental entity itself, but the~~ Just as a lawyer representing a corporation also serves the corporation's officers, directors, employees, affiliates, subsidiaries, departments and other constituents, a lawyer for a governmental entity must also serve the entity's varying constituents. In serving those constituents, the governmental attorney is nonetheless considered to be representing one client, the governmental entity. For example, a lawyer in the Office of Legislative Counsel by statute represents the interests of the majority and minority leadership of the House or Senate, individual legislators, committee members, and legislative staff, among others. A lawyer in that office is nonetheless considered to represent one client, namely, the Legislature. The relationship between the government lawyer or lawyer in military service and the client may be further defined by statute, regulation, ordinance or other law. This rule does not limit that authority. In addition, a lawyer for the government may have a legal duty to question the conduct of government officials and perform additional remedial or corrective actions including investigation and prosecution. The lawyer may also have an obligation to divulge information to persons outside the government to respond to illegal or improper conduct of the organizational client or its constituents. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, where public business is involved. The obligation of the government lawyer may require representation of the public interest as that duty is specified by law.

Comment 13a to Rule 1.13, Clean Copy

Government Agency

[13a] Utah Rule 1.13, unlike the ABA Model Rule, contains paragraph (h), which deals with the relationship between government lawyers and the government entities they represent. The duties defined in this Rule apply to government lawyers and lawyers in military service, except to the extent the responsibilities of the government lawyers are otherwise controlled by the duties imposed upon them by law. A government lawyer following those legal duties in good faith will not be considered in violation of the ethical standards of this rule. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Just as a lawyer representing a corporation also serves the corporation's officers, directors, employees, affiliates, subsidiaries, departments and other constituents, a lawyer for a governmental entity must also serve the entity's varying constituents. In serving those constituents, the governmental attorney is nonetheless considered to be representing one client, the governmental entity. For example, a lawyer in the Office of Legislative Counsel by statute represents the interests of the majority and minority leadership of the House or Senate, individual legislators, committee members, and legislative staff, among others. A lawyer in that office is nonetheless considered to represent one client, namely, the Legislature. The relationship between the government lawyer or lawyer in military service and the client may be further defined by statute, regulation, ordinance or other law. This rule does not limit that authority. In addition, a lawyer for the government may have a legal duty to question the conduct of government officials and perform additional remedial or corrective actions including investigation and prosecution. The lawyer may also have an obligation to divulge information to persons outside the government to respond to illegal or improper conduct of the organizational client or its constituents. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, where public business is involved. The obligation of the government lawyer may require representation of the public interest as that duty is specified by law.

UTAH STATE LEGISLATURE
OFFICE OF LEGISLATIVE RESEARCH & GENERAL COUNSEL



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Memorandum

To: Members of the Rules of Professional Conduct Advisory Committee

From: M. Gay Taylor, Legislative General Counsel
Roger O. Tew, representing Utah League of Cities and Towns

Date: July 7, 2005

Subject: Suggested Additional Comment to the Proposed Rules of Professional Conduct to address Lawyers Representing Governmental Legislative Bodies

In response to our conversation on June 20, 2005, we have prepared the following language which we would suggest be added as a comment to Rule 1.13 of the Proposed Rules of Professional Conduct:

Comment [13b] When the client is a governmental legislative body (such as the Utah Legislature, a city council, a county council or commission), a lawyer representing that legislative body may concurrently represent the interests of the majority and minority leadership, members and members elect, committee members, and staff to the legislative body. In representing the legislative body and the various interests therein, the lawyer is considered to be representing one client and the rules relating to conflict of interest and required consent do not apply.

UTAH STATE SENATE

UTAH STATE CAPITOL COMPLEX • WEST OFFICE BUILDING, SUITE W115

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June 14, 2005

To the Members of the Rules of Professional Conduct Advisory Committee:

Re: Proposed Changes to the Rules of Professional Conduct

The Legislature's Judicial Rules Review Committee met on June 13, 2005* to review the Proposed Changes to the Rules of Professional Conduct. I am forwarding the comments I made on these rules at that meeting directly to you for your consideration in your June 20, 2005 meeting.

On Page 56, lines 62-63, the rule prohibits a lawyer from acquiring "a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except . . . " as authorized by the rules. My concern with the proposed rules is that I believe the definition of "proprietary interest" should be expanded to include a plaintiff's attorney who is taking an equitable interest in property that is subject to the litigation. This is especially necessary when that property is subject to land use litigation. Currently, plaintiff attorneys report that the Utah State Bar says this practice is okay. It should not be. It creates a clear potential for conflict of interest between the client's and the attorney's interests.

I would urge you to expand your list of what encompasses a "proprietary interest" to include the prohibition of a plaintiff's attorney taking an equitable interest in the property which is the subject of the litigation.

Thank you for your consideration of this change.

Sincerely,

David L. Thomas

Senator David L. Thomas

*Our Judicial Rules Review Committee had originally scheduled a meeting to review these rules on June 3, 2005, so they could comply with the June 6, 2005 comment period. However, the staff of the Administrative Office of the Courts expressed concern they could not attend on that date and asked the Committee to postpone its meeting. We did so with the understanding that the Supreme Court would extend its comment period to allow for the Judicial Rules Review Committee to make comment soon after their June 13, 2005 meeting.

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Rule 1.8. Conflict of ~~i~~Interest: ~~prohibited transactions~~ Current Clients: Specific Rules.

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(a)(1) ~~The~~ the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing ~~to the client~~ in a manner ~~which~~ that can be reasonably understood by the client; ~~and~~

(a)(2) ~~The client~~ the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel ~~in~~ on the transaction; and

(a)(3) ~~The client consents in writing thereto~~ the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client ~~consents after consultation~~ gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not ~~prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling or spouse~~ solicit any substantial gift from a client, including a testamentary gift, ~~except where the client is related to the donee.~~ or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purpose of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or an account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(e)(1) ~~A~~ a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(e)(2) ~~A~~ a lawyer representing an indigent client may pay court costs and expenses of litigation, and minor expenses reasonably connected to the litigation, on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(f)(1) ~~The~~ the client ~~consents after consultation~~ gives informed consent;

(f)(2) ~~There~~ there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(f)(3) ~~Information~~ information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client ~~consents after consultation, including disclosure of~~ gives informed consent, in writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(h)(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless ~~permitted by law and~~ the client is independently represented in making the agreement; or

(h)(2) settle a claim or potential claim for such liability with an unrepresented client or former client ~~without first advising that person in writing that independent representation is appropriate~~ unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

~~(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.~~

~~(j)~~(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(i)(1) ~~Acquire~~ acquire a lien ~~granted~~ authorized by law to secure the lawyer's fee or expenses; and

(i)(2) ~~Contract~~ contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not engage in sexual relations with a client that exploit the lawyer-client relationship. For the purposes of this Rule:

(j)(1) "sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse; and

(j)(2) except for a spousal relationship or a sexual relationship that existed at the commencement of the lawyer-client relationship, sexual relations between the lawyer and the client shall be presumed to be exploitive. This presumption is rebuttable.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (j) that applies to any one of them shall apply to all of them.

Comment

Business Transactions Between Client and Lawyer

~~As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions, a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however,~~

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a

From: "Bob Burton Jr." <bobb@burtonlumber.com>
To: "Billy Walker" <bwalker@utahbar.org>, "'Bob Burton Atty.'" <bobb@burtonlumber.com>, "Earl Wunderli" <emwunderli@msn.com>, "Fred Howard (Fred Howard)" <jhoward@email.utcourts.gov>, "Gary Chrystler" <glc101@veracitycom.net>, "Gary Sackett" <gsackett@joneswaldo.com>, "John Soltis" <jsoltis@co.slc.ut.us>, "Kent Roche" <kroche@pblutah.com>, "Marilyn Branch" <mattyb@email.utcourts.gov>, "'Nayer H. Honavar'" <nayerhonarvar@hotmail.com>, "Paul Maughan" <pmaughan@email.utcourts.gov>, "Paula Smith" <psmith@co.slc.ut.us>, "'Royal I. Hansen'" <rhansen@email.utcourts.gov>, "Stephen Roth" <sroth@email.utcourts.gov>, "Steven Johnson" <stevej@norbest.com>, "Stuart Schultz" <sschultz@strongandhanni.com>
Date: 7/15/05 4:36PM
Subject: FW: Rule 1.13 and governmental legislative bodies

Committee Members:

I am forwarding an e-mail I received from Gary Sackett regarding Rule 1.13. Please consider Gary's comments in conjunction with the other materials you received earlier. See you on Monday.

Bob Burton

-----Original Message-----
From: Gary Sackett [mailto:gsackett@joneswaldo.com]
Sent: Friday, July 15, 2005 1:58 PM
To: bobb@burtonlumber.com
Subject: Rule 1.13 and governmental legislative bodies

Bob:

I will be in Virginia during the Committee's next meeting, but I feel strongly about the carry-over item from last month's agenda involving Rule 1.13 and governmental legislative bodies.

I am dead-set against ANY comment of the type suggested in the Memorandum submitted by Gay Taylor and Roger Tew. Neither the rules nor their comments are the proper place for addressing a special situation, nor are they a proper vehicle for trying to identify and list all the possible legal relationships that may be internal to a legislative body. References to such ill-defined concepts as the "majority and minority leadership" are not the kinds of building blocks that constitute the rules and comments. If Legislative Counsel or other counsel for government entities want to brandish something definitive at the constituents within their organizations (which, in my judgment, would only be an unnecessary surrogate for proper education of the constituents), they may seek an advisory opinion from the Ethics Advisory Opinion Committee.

If there is any way to vote on this matter by proxy, I would like to assign that proxy to a person of the same persuasion, I would like to do so. (I think Steve Johnson and or John Soltis had this view.)

See you at the next meeting.

*Gary