

**ETHICS FOR THE PUBLIC SECTOR ATTORNEY**  
**WHO IS MY CLIENT?**  
(And who cares?)

- A. Why do we care?
1. An attorney owes certain ethical duties to “the client”
    - a. Rule 1.1 – represent client competently
    - b. Rule 1.2 – abide by the client’s decisions
    - c. Rule 1.3 – be diligent and prompt in representing the client
    - d. Rule 1.4 – keep client informed
    - e. Rule 1.6 – maintain client confidence
    - f. Rule 1.7 – avoid conflicts of interest between two clients
    - g. Rule 1.8 – client conflicts: specific rules
    - h. Rule 1.9 – avoid conflicts of interest between current and former clients
    - i. Rule 1.10 – imputed disqualification
    - j. Rule 1.11 – successive government and private practice
    - k. Rule 1.13 – organization as a client
    - l. Rule 1.16 – terminating client representation
    - m. Rule 2.1 – rendering advice to a client
    - n. Rule 3.8 – special duties as a prosecutor
  2. Who are we going to get in trouble with? – the Bar, the client, the due process attack
- B. Who is the public sector attorney’s client? – see Rule 1.13; UCA, Chapter 17-18a
1. Rule 1.13
  2. Utah Code: 17-18a-801 & 802
  3. Commission v. Short, 989 P.2d 899 (Utah 1999)
- C. Most likely complaints about public sector civil attorney conduct
1. Loyalty to the client
  2. The attorney’s conflicts of interest
  3. Maintaining client confidences
- D. Conflicting “Clients” – Districts, Interlocal Entities, Planning and Merit Commissions
1. Representing employees
  2. The “Adnarim” warning
- E. The Due Process Attack
1. Ethics rule violation – a deprivation of due process?
  2. V-1 Oil v. Department of Environmental Quality, 939 P.2d 1192 (Utah 1997)

## **RULES OF PROFESSIONAL CONDUCT**

### **Rule 1.1. Competence.**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

### **Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer.**

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

### **Rule 1.3. Diligence.**

A lawyer shall act with reasonable diligence and promptness in representing a client.

### **Rule 1.4. Communication.**

(a) A lawyer shall:

(a)(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(a)(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(a)(3) keep the client reasonably informed about the status of the matter;

(a)(4) promptly comply with reasonable requests for information; and

(a)(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

### **Rule 1.6. Confidentiality of Information.**

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(b)(1) to prevent reasonably certain death or substantial bodily harm;

(b)(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(b)(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(b)(4) to secure legal advice about the lawyer's compliance with these Rules;

(b)(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(b)(6) to comply with other law or a court order; or

(b)(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

(d) For purposes of this rule, representation of a client includes counseling a lawyer about the need for or availability of treatment for substance abuse or psychological or emotional problems by members of the Utah State Bar serving on a Utah State Bar endorsed lawyer assistance program.

#### **Rule 1.7. Conflict of Interest: Current Clients.**

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(a)(1) The representation of one client will be directly adverse to another client; or

(a)(2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(b)(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(b)(2) the representation is not prohibited by law;

(b)(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(b)(4) each affected client gives informed consent, confirmed in writing.

**Rule 1.8. Conflict of Interest: 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 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 in a manner that can be reasonably understood by the client;

(a)(2) 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 on the transaction; and

(a)(3) 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 gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift 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 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 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 client gives informed consent;

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

(f)(3) 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 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 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 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 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 a lien authorized by law to secure the lawyer's fee or expenses; and

(i)(2) 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 (i) that applies to any one of them shall apply to all of them.

#### **Rule 1.9. Duties to Former Clients.**

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) 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 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.

#### **Rule 1.10. Imputation of Conflicts of Interest: General Rule.**

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

- (b)(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
- (b)(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.
- (c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:
  - (c)(1) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom, and
  - (c)(2) written notice is promptly given to any affected former client.
- (d) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.
- (e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.
- (f) An office of government lawyers who serve as counsel to a governmental entity such as the office of the Utah Attorney General, the United States Attorney, or a district, county, or city attorney does not constitute a "firm" for purposes of Rule 1.10 conflict imputation.

**Rule 1.11. Special Conflicts of Interest for Former and Current Government Employees.**

- (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
  - (a)(1) is subject to Rule 1.9(c); and
  - (a)(2) 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.
- (b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
  - (b)(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
  - (b)(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.
- (c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which at the time the Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.
- (d) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee:
  - (d)(1) is subject to Rules 1.7 and 1.9; and
  - (d)(2) shall not:

(d)(2)(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(d)(2)(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As 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 1.13. Organization as a Client.**

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if,

(c)(1) despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(c)(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who has been discharged and reasonably believes the discharge was because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to ensure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

(h) 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. The government lawyer's client is the governmental entity except as the representation or duties are otherwise required by law. The responsibilities of the lawyer in paragraphs (b) and (c) may be modified by the duties required by law for the government lawyer.

#### **Rule 1.16. Declining or terminating representation.**

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(a)(1) the representation will result in violation of the rules of professional conduct or other law;

(a)(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(a)(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(b)(1) withdrawal can be accomplished without material adverse effect on the interests of the client ;

(b)(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(b)(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(b)(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(b)(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(b)(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(b)(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer must provide, upon request, the client's file to the client. The lawyer may reproduce and retain copies of the client file at the lawyer's expense.

#### **Rule 2.1. Advisor.**

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

**Rule 3.8. Special Responsibilities of a Prosecutor.**

The prosecutor in a criminal case shall:

- (a) Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) Make reasonable efforts to ensure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) Make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
- (e) Exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

### **RULE 1.13. ORGANIZATION AS A CLIENT**

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if,

(c)(1) despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(c)(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who has been discharged and reasonably believes the discharge was because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to ensure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders. (h) 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. The government lawyer's client is the governmental entity except as the representation or duties are otherwise required by law. The responsibilities of the lawyer in paragraphs (b) and (c) may be modified by the duties required by law for the government lawyer.

[Adopted effective November 1, 1996; amended effective November 1, 2005.]

## Comment

### The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constitu-

ents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the

responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest

authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

#### **Relation to Other Rules**

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules, 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict or limit the provisions of Rule 1.6(b)(1)-(6). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances, Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by

an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A discharged lawyer who reasonably believes the discharge was because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to ensure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

#### **Clarifying the Lawyer's Role**

[9] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to ensure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[10] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of the case.

#### **Dual Representation**

[11] Paragraph (g) recognizes that a lawyer for an organization may also rep-

resent a principal officer or major shareholder.

#### **Derivative Actions**

[12] Under some circumstances, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[13] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

#### **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. A government lawyer following these legal duties in good faith will not be considered in violation of the ethical standards of this Rule. 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. Defining precisely the identity of the client and prescribing the resulting obli-

gations 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 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 ensuring 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.

[13b] When the client is a governmental legislative body (such as the Utah Legislature, a city council, or 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 related to conflict of interest and required consent to conflicts do not apply.

#### Library References

Attorney and Client ¶21.5(1), 21.5(3), 32(10).  
 Westlaw Key Number Searches: 45k21.5(1); 45k21.5(3); 45k32(10).  
 C.J.S. Attorney and Client §§ 6, 43 to 58, 86, 150 to 159, 164.

#### Notes of Decisions

Construction with other laws 1  
 County attorneys 3  
 Scope of relationship 2

##### 1. Construction with other laws

County attorney was the adviser only to county as an entity, and had no attorney-client relationship with the county commission or its individual commissioners; statutes defining county attorney's role as adviser did not alter or expand attorney-client relationship with county. U.C.A.1953, 17-18-1.5(6)(c), 17-18-2; Rules of Prof.Conduct, Rule 1.13. Salt Lake County Com'n v. Salt Lake Co. Atty., 1999, 985 P.2d 899, 375 Utah Adv. Rep. 7, 1999 UT 73. District And Prosecuting Attorneys ¶7(1)

##### 2. Scope of relationship

As an elected attorney for a county, a county attorney is obligated to follow his client's instructions; the county attorney does not have the right to second-guess the agent, so long as the agent is acting within the scope of the

agent's legal authority. U.C.A.1953, 17-5-219; Rules of Prof.Conduct, Rules 1.12, 1.13. Salt Lake County Com'n v. Salt Lake Co. Atty., 1999, 985 P.2d 899, 375 Utah Adv. Rep. 7, 1999 UT 73. District And Prosecuting Attorneys ¶7(1)

Only when a county attorney determines that there is a potential for a violation of law is he given certain limited remedies which are available to a private attorney vis-a-vis his or her client, including asking for reconsideration, appealing to outside counsel, and then appealing to the highest authority within the entity. Rules of Prof.Conduct, Rule 1.13(b)(1-3). Salt Lake County Com'n v. Salt Lake Co. Atty., 1999, 985 P.2d 899, 375 Utah Adv. Rep. 7, 1999 UT 73. District And Prosecuting Attorneys ¶8(4)

County attorney has an attorney-client relationship only with the county as an entity, not with the county commission or the individual commissioners apart from the entity on behalf of which they act. U.C.A.1953, 17-18-1.5(6)(c), 17-18-2; Rules of Prof.Con-

duct, Rule 1.13. Salt Lake County Com'n v. Salt Lake Co. Atty., 1999, 985 P.2d 899, 375 Utah Adv. Rep. 7, 1999 UT 73. District And Prosecuting Attorneys ⇐ 7(1)

### 3. County attorneys

If a current attorney client relationship exists between a county attorney or a deputy county attorney and a person who may be a defendant in an action under § 17-5-206 of Utah Code to recover or restrain unlawful payments of county funds, attorney with such an attorney client relationship may not ethi-

cally participate in such an action. Imputed disqualification under Rule 1.10 does not apply to the office of a full time county attorney, so that individual county attorneys or deputy county attorneys who are free from conflicts in the matter may participate in such an action, provided appropriate screening procedures are established and maintained. Past representations by individual members of county attorney's office must be evaluated for conflicts under provisions of Rule 1.9. Utah St. Bar Eth. Op. No. 98-06, 1998 WL 779174 (approved Oct. 30, 1998).

**Chapter 18a**  
**Powers and Duties of County and District Attorney**

**Part 1**  
**General Provisions**

**17-18a-101 Title.**

This chapter is known as "Powers and Duties of County and District Attorney."

Enacted by Chapter 237, 2013 General Session

**17-18a-102 Definitions.**

- (1) "Attorney" means a county attorney described in Section 17-18a-301 or a district attorney described in Section 17-18a-301.
- (2) "Prosecution district" means a district created under Part 7, Prosecution District.

Enacted by Chapter 237, 2013 General Session

**Part 2**  
**Duties**

**17-18a-201 County and district attorney duties.**

The duties, functions, and responsibilities of a county attorney or district attorney, acting as a public prosecutor or as civil counsel, are as provided in this chapter.

Enacted by Chapter 237, 2013 General Session

**17-18a-202 County attorney powers and functions.**

- (1) Except within a county that is located in a prosecution district, the county attorney:
  - (a) is a public prosecutor for the county; and
  - (b) shall perform each public prosecutor and civil counsel duty in accordance with this chapter or as otherwise required by law.
- (2) In a county that is located within a prosecution district, the county attorney:
  - (a) is the civil counsel for the county; and
  - (b) shall perform each civil counsel duty in the county or prosecution district in accordance with this chapter or as otherwise required by law.

Enacted by Chapter 237, 2013 General Session

**17-18a-203 District attorney powers and functions.**

In a county that is located within a prosecution district, the district attorney:

- (1) is a public prosecutor for the county; and
- (2) shall perform each public prosecutor duty in accordance with this chapter or as otherwise required by law.

Enacted by Chapter 237, 2013 General Session

**17-18a-204 Consolidated office.**

Within a prosecution district, the duties and responsibilities of the district attorney and county attorney may be consolidated into one office as provided in Section 17-16-3.

Enacted by Chapter 237, 2013 General Session

**Part 3  
Qualifications and Term**

**17-18a-301 County officers.**

(1) The county attorney is an elected officer as described in Section 17-53-101.

(2)

(a) If the boundaries of a prosecution district are located entirely within one county, the district attorney of the prosecution district is an elected officer of that county.

(b) If the boundaries of a prosecution district include more than one county, the interlocal agreement that creates that prosecution district in accordance with Section 17-18a-602 may designate the district attorney as an elected officer in one or more of the counties in which the prosecution district is located.

(3) The district attorney:

(a) is a full-time employee of the prosecution district; and

(b) may not engage in the private practice of law.

(4) A county attorney may:

(a) serve as a part-time employee; and

(b) engage in the private practice of law, subject to Section 17-18a-605 and the Rules of Professional Conduct.

Enacted by Chapter 237, 2013 General Session

**17-18a-302 Qualifications.**

(1) A person filing a declaration of candidacy for the office of county or district attorney shall be:

(a) a United States citizen;

(b) an attorney licensed to practice law in the state;

(c) an active member of the Utah State Bar in good standing;

(d) except as provided in Subsection (2), a registered voter in the county or prosecution district in which the attorney is elected to office; and

(e) except as provided in Subsection (2), as of the date of election, a resident for at least one year of the county or prosecution district in which the person seeks office.

(2) A person appointed to the office of county or district attorney in accordance with Section 20A-1-509.2 shall be:

(a) a United States citizen;

(b) an attorney licensed to practice law in the state; and

(c) an active member of the Utah State Bar in good standing.

Enacted by Chapter 237, 2013 General Session

**Part 4**  
**Public Prosecutor Duties**

**17-18a-401 Public prosecutor powers and duties.**

An attorney who serves as a public prosecutor shall:

- (1) except for a prosecution undertaken by a city attorney under Section 10-3-928, conduct, on behalf of the state, all prosecutions for a public offense committed within a county or prosecution district;
- (2) conduct, on behalf of the county, all prosecutions for a public offense in violation of a county criminal ordinance; and
- (3) perform all other duties and responsibilities as required by law.

Enacted by Chapter 237, 2013 General Session

**17-18a-402 Pretrial responsibilities.**

- (1)
  - (a) A public prosecutor shall:
    - (i) institute proceedings before the proper court:
      - (A) for the arrest of a person charged with a public offense; or
      - (B) if the prosecutor has probable cause to believe that a public offense has been committed and a grand jury has been convened by a court;
    - (ii) draw all indictments and information for offenses against:
      - (A) the laws of the state occurring within the county; and
      - (B) the criminal ordinances of the county;
    - (iii) cause all persons under indictment or informed against to be speedily arraigned for crimes charged; and
    - (iv) issue subpoenas for all witnesses for the state or for the county in the prosecution of a criminal ordinance.
  - (b) A public prosecutor described in Subsection (1)(a)(i)(B) shall:
    - (i) assist and attend the deliberations of the grand jury; and
    - (ii) prepare all necessary indictments and arrange for the subpoena of witnesses to appear before the grand jury.
- (2) The public prosecutor may:
  - (a) examine as to the sufficiency of an appearance bond that may be tendered to the court; and
  - (b) upon a court order:
    - (i) institute proceedings for the recovery upon forfeiture of a bond running to the state or county; and
    - (ii) enforce the collection of a bond described in Subsection (2)(b)(i).
- (3) The public prosecutor is authorized to grant transactional immunity to a witness for violation of a state statute or county criminal ordinance.

Enacted by Chapter 237, 2013 General Session

**17-18a-403 Appeal.**

- (1) A public prosecutor shall assist and cooperate, as required by the attorney general, in a case that may be appealed to the Court of Appeals or Utah Supreme Court regarding a criminal violation of state statute.
- (2) A public prosecutor shall appear and prosecute all appeals, in the appropriate court, for a crime charged as a misdemeanor in district court or as a violation of a county criminal ordinance.

Enacted by Chapter 237, 2013 General Session

**17-18a-404 Juvenile proceedings.**

For a proceeding involving a charge of juvenile delinquency, a public prosecutor shall appear and prosecute for the state in the juvenile court of the county.

Enacted by Chapter 237, 2013 General Session

**17-18a-405 Civil responsibilities of public prosecutors.**

A public prosecutor may act as legal counsel to the state, county, government agency, or government entity regarding the following matters of civil law:

- (1) bail bond forfeiture actions;
- (2) actions for the forfeiture of property or contraband, as provided in Title 24, Forfeiture and Disposition of Property Act;
- (3) civil actions incidental to or appropriate to supplement a public prosecutor's duties, including an injunction, a habeas corpus, a declaratory action, or an extraordinary writ action, in which the interests of the state may be affected; and
- (4) any other civil duties related to criminal prosecution that are otherwise provided by statute.

Amended by Chapter 189, 2014 General Session

**Part 5  
Counsel for Civil Actions**

**17-18a-501 Duties as civil counsel.**

The attorney shall:

- (1) appear in, prosecute, and defend each civil action in which the county is a party;
- (2) prosecute, either directly or through a private contract for debt collection, each action for the recovery of debts, fines, penalties, and forfeitures accruing to the county;
- (3) prosecute each appeal regarding a civil counsel's duties or functions in which the county is a party;
- (4) act as the civil legal advisor to the county; and
- (5) attend the meetings and hearings of the county legislative body as necessary.

Enacted by Chapter 237, 2013 General Session

**17-18a-502 Civil violation of county ordinance.**

The civil counsel shall enforce and prosecute, in the appropriate court, civil violations of a county ordinance.

Enacted by Chapter 237, 2013 General Session

**17-18a-503 Legal opinions.**

The civil counsel shall prepare a legal opinion in writing to a county officer on matters relating to the duties of the respective officer's office.

Enacted by Chapter 237, 2013 General Session

**17-18a-504 Review and approve as to form.**

The civil counsel shall review and approve as to form and legality each county contract, ordinance, regulation, real estate document, conveyance, and legal document.

Enacted by Chapter 237, 2013 General Session

**17-18a-505 Escheats to the state.**

The civil counsel shall:

- (1) assist in determining what estate or property located within the county escheates or reverts to the state; and
- (2) provide assistance to the county assessor and the state auditor in discovering and recovering an escheat.

Enacted by Chapter 237, 2013 General Session

**Part 6  
General Duties and Prohibitions**

**17-18a-601 Assistance to the attorney general.**

- (1)
  - (a) The attorney shall appear and assist the attorney general in criminal and civil legal matters involving the state if:
    - (i) except as provided in Subsection (1)(b), the attorney general requests assistance; or
    - (ii) the attorney is required by law to provide assistance.
  - (b) The attorney is not required to provide, if requested, the attorney general assistance if the attorney's assistance would:
    - (i) interfere with the attorney's duties and responsibilities to the county; or
    - (ii) create a conflict of interest.
  - (c) The attorney shall cooperate with the attorney general in an investigation, including an investigation described in Section 67-5-18.
- (2) The attorney general shall assist the attorney with a criminal prosecution if a court:
  - (a) finds that the attorney is unable to satisfactorily and adequately perform the duties of prosecuting a criminal case; and
  - (b) recommends that the attorney seek additional legal assistance.

Enacted by Chapter 237, 2013 General Session

**17-18a-602 Deputy attorneys.**

- (1) The attorney may employ a deputy attorney to perform the duties of public prosecutor or civil counsel.
- (2)
  - (a) Subject to the approval of the county attorney, the district attorney may cross deputize a county deputy attorney as a deputy district attorney.
  - (b) Subject to the approval of the district attorney, the county attorney may cross deputize a deputy district attorney as a deputy county attorney.
- (3) The county attorney may specially deputize, for a limited time or limited purpose, an attorney licensed to practice law in the state and in good standing with the Utah State Bar as a deputy to assist in any public prosecutor or civil counsel duties specified in the special deputization.

Enacted by Chapter 237, 2013 General Session

**17-18a-603 Legislative functions.**

The attorney:

- (1) may review a state statute;
- (2) shall review each county ordinance;
- (3) shall call to the attention of the state Legislature or the county legislative body any defect in the operation of the law; and
- (4) shall suggest and assist in presenting an amendment to correct the defect.

Enacted by Chapter 237, 2013 General Session

**17-18a-604 Other duties.**

The attorney shall perform each duty and responsibility of public prosecutor and civil counsel as provided by statute or ordinance.

Enacted by Chapter 237, 2013 General Session

**17-18a-605 Prohibited acts.**

- (1) Within the state, the attorney may not consult with or otherwise represent a person charged with a crime, misdemeanor, or breach of a criminal statute or ordinance.
- (2) A public prosecutor may not prosecute or dismiss in the name of the state a case in which the public prosecutor has previously acted as legal counsel for the accused.
- (3) A public prosecutor may not after the filing of an indictment or information and without the consent of the court:
  - (a) compromise a prosecution; or
  - (b) enter a plea of nolle prosequi.

Enacted by Chapter 237, 2013 General Session

**Part 7  
Prosecution District**

**17-18a-701 Creation of a prosecution district.**

A county legislative body may, by ordinance, create a countywide prosecution district.

Enacted by Chapter 237, 2013 General Session

**17-18a-702 Multicounty prosecution district.**

- (1)
  - (a) Subject to Subsection (2), two or more counties, whether or not contiguous, may enter into an agreement in accordance with Title 11, Chapter 13, Interlocal Cooperation Act, to create and maintain a prosecution district.
  - (b) A prosecution district described in Subsection (1)(a) shall include all of the area within the boundaries of each county party to the agreement.
- (2) A county may not enter into an agreement to create a multicounty prosecution district unless each county entering into the agreement is located within a single judicial district, as described in Section 78A-1-102, with the other party counties.

Enacted by Chapter 237, 2013 General Session

**17-18a-703 Dissolution of prosecution district.**

- (1) A county legislative body of a prosecution district described in Section 17-18a-701, or the legislative bodies of multiple counties within a multicounty prosecution district described in Section 17-18a-702, may not dissolve the prosecution district or multicounty prosecution district, respectively, during the term of office of an elected or appointed district attorney.
- (2) Each county legislative body shall ensure that an ordinance dissolving a prosecution district within a single county or an interlocal agreement dissolving a prosecution district within multiple counties:
  - (a) is enacted before February 1 of the year in which the regular general election, as defined in Section 20A-1-102, is held to elect an attorney; and
  - (b) takes effect on the first Monday in January after the year in which the attorney is elected.

Enacted by Chapter 237, 2013 General Session

**Part 8**  
**Ethical Responsibilities**

**17-18a-801 Public prosecutor's ethical duties.**

An attorney exercising public prosecutor duties under this chapter:

- (1) is a lawyer representing an organization as a client under the Rules of Professional Conduct, Rule 1.13;
- (2) represents the state as an organizational client;
- (3) is considered the representative of the state; and
- (4) is empowered to make commitments for and decisions on behalf of the state.

Enacted by Chapter 237, 2013 General Session

**17-18a-802 Representation by civil counsel -- County is client.**

- (1)

- (a) An attorney acting as civil counsel under this chapter represents an organization as a client in accordance with Rules of Professional Conduct, Rule 1.13.
- (b) The county is the client organization described in Subsection (1)(a).
- (2) The attorney:
  - (a) does not represent a county commission, county agency, county board, county council, county officer, or county employee;
  - (b) counsels with the county regarding civil matters; and
  - (c) receives direction from the county through the county elected officers in accordance with the officers' duties and powers in accordance with law.
- (3) Notwithstanding Subsection (2)(a), the attorney may represent an employee named as a party in litigation:
  - (a) with the approval of the county executive; and
  - (b) if permitted by law and the Rules of Professional Conduct.

Enacted by Chapter 237, 2013 General Session

**17-18a-803 License suspended -- Vacancy.**

If the attorney is suspended or disbarred from the practice of law in the state, the attorney's office is vacant immediately upon suspension or disbarment.

Enacted by Chapter 237, 2013 General Session

## SUMMARY

### UTAH STATUTES: GOVERNMENT EMPLOYEE ETHICAL REQUIREMENTS

**17-16a-1, et seq – The County Officers and Employees Disclosure Act:** The county disclosure act focuses on conflicts of interest between an employee's private financial or business interests and the employee's public duties. Certain activities are prohibited, such as revealing confidential information, using county employment to secure special advantages, and engaging in an outside interest which may interfere with county duties. The public disclosure of private business interests is required in most circumstances, and disclosure statements are filed with the county council.

**67-16-1, et seq – Utah Public Officers' and Employees' Ethics Act:** The substantive prohibitions and disclosures in this act are almost identical to those in the county disclosure law. This statute is binding on state and district employees, but not in counties and cities.

**10-3-1301, et seq – Municipal Officers' and Employees' Ethics Act:** The substantive prohibitions and disclosures in this act are almost identical to those in the county and state disclosure laws, and is binding on city and town employees.

**11-49-101, et seq – Political Subdivisions Ethics Review Commission:** This statute creates a commission at the state level that is charged with investigating violations of the county and municipal conflict of interest and disclosure law; members are appointed by the Governor and staff provided by the Legislature. It creates a formal, quasi-judicial administrative hearing process to review complaints of conflicts of interest, with subpoena and contempt power and a confidentiality requirement. The commission may, if it finds a violation of the law, recommend legal or disciplinary action by the employer against the person accused of misconduct. Cities and counties may create their own ethics commission; if they do so, the local commission trumps the state body's jurisdiction.

**67-21-1, et seq – Utah Protection of Public Employees Act:** This law establishes 'whistle-blower' protections for government employees who report misconduct or unethical behavior in the public sector workplace; the chapter prohibits and establishes penalties for retaliation against whistle-blowers. The whistle must be blown in good faith and to the appropriate person or entity in the government, as defined in the statute. A private cause of action is created, with damages and injunctive relief, and a person who violates the prohibition against retaliation is subject to a \$500 fine and termination of employment. A local government may establish an independent personnel review board to hear retaliation complaints, which would create an 'exhaustion of remedies' requirement for whistle-blowers.

## **“ADNARIM” WARNING**

In interviews with county employees regarding legal claims and investigations, it is often necessary to give certain admonitions at the outset of the meeting regarding the attorney’s role and explaining who the attorney represents. Though different needs may arise depending on the issue, minimum warnings ought to include the following elements:

- Start with a concise statement of the purpose of the interview, explaining that the interview is conducted to help county officials respond to litigation or a similar legal matter or to provide sensitive legal advice.
- Explain that the lawyers represent the county, not any particular county officer or employee (although this may not be the case if the attorney is representing an employee in his or her individual capacity who was acting for the county).
- Point out that interviews are conducted subject to attorney/client and work product privileges and the interviewee may not disclose matters discussed. The employee may not discuss the interview with anyone, as this could harm confidentiality.
- Explain that county officers and managers might chose to disclose anything said, to advance the legal interests of the county, or that the law may require that some statements be disclosed.
- Remind employees that they must tell the truth and that failure to cooperate or to be truthful may result in disciplinary action.

Care should be taken by the county’s attorney to determine whether statements by the interviewee might indicate that the employee may be subject to criminal charges or that the interviewee’s and the county’s legal interests may conflict. In such cases, the attorney should consider whether to advise the interviewee to retain private legal counsel.

## **HYPOTHETICAL QUESTION**

You have just been invited to a meeting with the Board of County Commissioners and the County's Personnel Manager. You learn that a serious complaint of sexual harassment has been lodged against the County Assessor by one of his employees and the County Commission want to know what to next. You suggest that the charges need to be investigated to determine if the victim's claims have merit and if some kind of action is necessary against the Assessor. In the alternative, does the county need to gear up a full-court press to squash the "victim" if she files a lawsuit? The County Commission asks whether it would be better for your office or for them to conduct such an investigation.