



**ILLINOIS STATE  
BAR ASSOCIATION**

# **ISBA Advisory Opinion on Professional Conduct**

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**ISBA Advisory Opinions on Professional Conduct are prepared as an educational service to members of the ISBA. While the Opinions express the ISBA interpretation of the Illinois Rules of Professional Conduct and other relevant materials in response to a specific hypothesized fact situation, they do not have the weight of law and should not be relied upon as a substitute for individual legal advice.**

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**This Opinion was AFFIRMED by the Board of Governors in January 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.4(b), 1.7 & Comment [34], & 1.13(a). This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.**

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**Opinion No. 07-01  
July 2007**

**TOPICS:** Conflict of Interest  
State Agencies

**DIGEST:** Because state government is not one entity composed of all departments under the jurisdiction of the Governor for purposes of resolving conflict of interest questions, a lawyer may represent one state government agency while representing a private party adverse to another state government agency.

**REF.:** Illinois Rules of Professional Conduct, Rules 1.4(b), 1.7(b), 1.13(a)  
ISBA Opinion 01-07  
ABA Formal Opinion 97-405  
*Gray v. Rhode Island Dept. of Children, Youth and Families*, 937 F.Supp. 153,  
159 (D.R.I. 1996)

## FACTS

In the past, lawyer has sued various state governmental agencies for discrimination and/or employment issues. Lawyer is currently suing departments of state government under the jurisdiction of the Governor.

Lawyer is contacted by a state governmental agency that he has not sued in the past nor is currently suing. Although the reason for the contact was not indicated, presumably it is to engage in the lawyer's services.

### QUESTION

For purposes of resolving conflict of interest questions, is each state governmental agency under the jurisdiction of the Governor considered a separate entity or is the "state government" one entity composed of all departments under the jurisdiction of the Governor?

### OPINION

Rule 1.13(a) reads "[a] lawyer engaged or retained by an organization represents the organization acting through its duly authorized constituents."

Rule 1.7(b) provides:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes that the representation will not be adversely affected; and
- (2) the client consents after disclosure.

Thus, if the state government is one entity, composed of all departments under the jurisdiction of the Governor, there would be a conflict of interest if the attorney had sued and was suing some state governmental agencies while representing another state agency.

We have previously concluded that for conflict of interest questions, representing one local government unit does not mean that the lawyer represents the entire local government. *See* ISBA Op. 01-07. We now extend that opinion to apply to state government. Thus, we find that for the purpose of resolving conflict of interest questions, there is not one "state government" entity composed of all departments under the jurisdiction of the Governor. Illinois is not alone in this interpretation:

The District of Columbia Bar Special Committee on Government Lawyers and The Model Rules of Professional Conduct, the New York State Bar Association, and the State Bar of Montana Ethics Committee have all examined the issue of client identification with regard to governmental lawyers. All agree that the appropriate rule should be that a lawyer representing a governmental agency only represents that agency and not the government as a whole. *Gray v. Rhode Island Dept. of Children, Youth and Families*, 937 F.Supp. 153, 158 (D.R.I. 1996).

As noted in *Gray*, “applying the Rules to the ‘State’ or government as a whole is too difficult ... because of the wide reaching expanse of governmental entities. Treating the whole government as the client creates great difficulty in delineating the lines of ethical standards ....” *Id.* If the State were the client, rather than only the individual agency, then conflicts of interest would abound should one agency sue another. Additionally, “as the D.C. Bar Report noted ‘[t]he identification of one’s client as the entire government would raise serious questions regarding client control and confidentiality.’” *Id.* at 159.

Therefore, we conclude that for the purpose of conflict of interest questions, there is not one entity, composed of all state agencies. But, we caution this does not mean that each state governmental agency is necessarily a separate entity from every other state governmental agency. On a case-by-case basis additional information must be considered, such as “whether or not each government entity has independent legal authority to act on the matter in question, and whether representation of one government entity has any importance to the other government entity.” ISBA Op. No. 01-07, *citing* ABA Formal Opinion 97-405 (the identity of a government client is partly a matter of “common sense and sensibility” requiring an analytical approach looking at “functional considerations as how the government client presented to the lawyer is legally defined and funded, and whether it has independent legal authority with respect to the matter for which the lawyer has been retained”). Additionally, one needs to consider “whether or not decision makers within the government agencies with whom the lawyers would be working were one and the same.”

And, as noted in ISBA Op. 01-07, the lawyer may have an obligation under Rule 1.4(b) to notify the state agency wishing to employ him about the previous and ongoing lawsuits. Rule 1.4(b) states that “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” To the extent the lawyer foresees a conflict between the agency the lawyer wishes to represent and the agencies the lawyer has in the past and is now suing, the lawsuits must be disclosed and consent obtained.

### CONCLUSION

Because the state government is not one entity composed of all departments under the jurisdiction of the Governor for purposes of resolving conflict of interest questions, a lawyer may represent one government agency while representing a private party adverse to another state government agency.