

Utah Ethics Opinions

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04-01A. USB EAOE Opinion No. 04-01A

UTAH STATE BAR

Ethics Advisory Opinion Committee

Opinion 04-01A

December 2, 2004

Amendment of Opinion No. 04-01:

On March 29, 2004, the Utah Ethics Advisory Opinion Committee issued Utah Ethics Advisory Op. No. 04-01, 2004 WL 870583 (Utah St. Bar).¹ The Office of Professional Conduct of the Utah State Bar filed a petition for review with the Board of Bar Commissioners pursuant to § III(e)(1) of the Ethics Advisory Opinion Committee Rules of Procedure and § VI(a)(1) of the Utah State Bar Rules Governing the Ethics Advisory Opinion Committee. The Commission asked the Committee to reconsider Opinion No. 04-01. Having reviewed the issues raised by the Office of Professional Conduct, we issue this amended opinion, which revises the conclusion and analysis of Opinion No. 04-01. Accordingly, this amended opinion replaces and supersedes Opinion No. 04-01.

Issue: What action, if any, may a lawyer for an employer ethically undertake on behalf of a vanished former employee who, along with the employer, has been named as a defendant in an action arising when the person was an employee?

Opinion: The lawyer may not act on behalf of or purport to represent the vanished former employee unless the lawyer has an existing attorney-client relationship with the former employee or the former employee agreed to the representation prior to vanishing and, in either case, the lawyer complies with Rules 1.7 and 1.8(f) of the Utah Rules of Professional Conduct. The lawyer who represents the employer may engage in acts that may benefit the vanished former employee provided the lawyer makes it clear that he is acting on behalf of the employer as the employer's lawyer and not on behalf of the vanished former employee as the former employee's lawyer.

Facts: Plaintiff filed suit naming a company and its former employee as defendants. The company concedes that the former employee was acting in the course and scope of his employment and has asked the company's lawyers to represent the missing former employee. The company is

concerned that absence of a formal answer to the complaint by the former employee may result in a default judgment being entered against the absent former employee. We have no information about the reasons for the employee's absence, but we assume that a reasonable effort has been made to locate the person and determine the reason for the absence. We also assume that, at this early stage of the proceeding, the interests of the employer and employee are not directly adverse with respect to the matter.² The lawyer requesting this opinion also indicated that the employer has liability insurance that covers the incident giving rise to the lawsuit.³ The company has requested that the lawyer represent the vanished former employee.

Analysis: This case presents two competing concerns: On the one hand, a basic ingredient of the representation of a client is that, under Rule 1.4, the lawyer communicate with the client, keep the client informed about the status of the case, and provide sufficient information to the client that the client may make informed decisions; and, under Rule 1.2, the lawyer must abide by the client's decisions regarding the goals of the representation. On the other hand, the interests of a party missing from a proceeding will go unprotected with an application of the Rules. The Rules of Professional Conduct are rules of reason,⁴ to be interpreted to further the administration of justice when the Rules are unclear. However, in this instance, we conclude the Rules are clear and must be applied despite arguments of countervailing public policy.⁵

The employer's lawyer may not purport to represent the vanished former employee or take action (including the filing of an answer or other papers with the court) as the vanished employee's lawyer, unless the lawyer already has an existing attorney-client relationship or the former employee has agreed to the representation prior to vanishing, and the lawyer complies with the conflict-of-interest requirements of Rules 1.7 and 1.8(f). To do so would be a violation of Rules 1.2, 1.4 and 1.8 and, in some situations, Rules 1.7, 3.1 and 3.2.

The attorney-client relationship is grounded in principles of agency, which require that the agent (attorney) must be authorized to act for the principal (client) and that the principal must have control over the agent.⁶ The Rules of Professional Conduct reflect this principle. Rule 1.2 states that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued." Under the facts here, the Committee assumes that the lawyer and client have not communicated at all. Thus, the lawyer cannot consult with the client regarding the objectives of the representation or the means by which

to achieve those objectives.⁷

Rule 1.4 requires the attorney to maintain reasonable communication with the client. In situations in which the attorney has had no contact with the client, we believe the "reasonable" communication requirement cannot be satisfied.

Rule 1.7 governs conflicts of interest. The employer may be liable to the plaintiff if the employee was acting within the scope of his employment. However, the employer may have a cause of action against the employee for indemnity if the employee's actions were in dereliction of duty (e.g., drunk on the job). Under the facts in this case, the potential for a conflict of interest does exist. Although we assume that the employer and employee are not likely to assert claims against one another initially (see note 2, *supra*), due to the potential conflict of interest, Rule 1.7(b)(2) requires the client's consent to the representation "after consultation." Rule 1.7(b)(2) further requires for representations of multiple clients in a single matter that "the consultation shall include explanation to each client of the implications of the common representation and the advantages and risks involved." If the attorney cannot communicate with the client, the attorney cannot make the explanation required by the rule, cannot obtain the client's consent to representation and would therefore violate Rule 1.7. Moreover, if it is later discovered that the employer's and the employee's interests conflict, the attorney may be prohibited from representing either of them.

In addition, Rule 1.8(f)(1) prohibits an attorney from accepting compensation for representing a client from one other than the client unless the client consents after consultation. Under the facts before us, the attorney cannot obtain this consent and would therefore violate Rule 1.8.

Rule 3.1 requires the attorney to make only meritorious claims and contentions. The attorney may be able to perform an adequate investigation to comply with this rule. If, however, the employer did not take a sufficiently detailed statement from the employee regarding the facts of the incident and other employees do not have sufficient knowledge of the facts, the attorney may not have sufficient information to determine whether the defenses raised are meritorious.

This opinion does not prohibit a lawyer from taking some action on behalf of an existing client when the lawyer and client lose contact. For example, a lawyer has a general obligation to preserve a client's assets that may be in the lawyer's possession when the client disappears and to make reasonable attempts to locate the client.⁸ There are numerous opinions that find it ethical to file pleadings on behalf of a missing existing client to toll a statute of limitations.⁹ This obligation is stated in Rule 1.16(d), which

requires an attorney to take steps to the extent reasonably practicable to protect a client's interest prior to terminating representation. Similarly, if the former employee had consented to the representation at the employer's expense prior to vanishing, the lawyer would be permitted to undertake the representation, provided the lawyer complied with Rule 1.7.

The employer-client may have a contractual obligation to (and contractual authorization of) its employees and former employees to provide representation where the employees were acting within the course and scope of their employment.¹⁰ Even absent a contractual obligation and authorization to represent the vanished employee, the company's lawyer has the general obligation to protect the company's interests and to advance the administration of justice. When Rule 1.7 is complied with, a single lawyer may ethically represent both the employee or former employee and the employer.

The Committee concludes that the company's lawyer may take limited action that may have the effect of benefitting the vanished former employee, so long as the lawyer does so on behalf of the company and as the company's lawyer, not purporting to act on behalf of or as the former employee's lawyer.

For example, in connection with seeking an extension of time to file an answer or motion in response to a complaint on behalf of the company, the lawyer may also seek an extension of time to permit the former employee to file an answer or motion, provided the lawyer makes clear the lawyer is acting on behalf of the company and as the company's lawyer. The lawyer may also file with the court, as the company's lawyer, a motion to intervene, a motion for appointment of a guardian ad litem for the vanished employee or other similar pleading. Such actions may be taken as appropriate to protect the company's legitimate interests, and the Rules of Professional Conduct are not violated even though the result of such acts may benefit the vanished former employee.

Some may argue that the Rules of Professional Conduct may lead to harsh, and even unfair, results for both the employee and the employer. The first concern is that a default judgment would be entered against the former employee if the attorney does not file the answer. As discussed, above, unless the former employee is eventually located, the lawyer will likely not be able to change the ultimate outcome, but may delay the result. Further, the Utah Rules of Civil Procedure and existing case law allow the former employee to seek to set the judgment aside in some situations.

The second concern is that the employer may be harmed because a default against the former employee may bind the

employer and the employer has no other procedural means to protect itself. The Committee could not find any Utah case law directly addressing this issue. There are two Utah cases that suggest (without directly deciding) that the employer has means in the law to protect itself against a default judgment against the former employee.¹¹ Cases from other jurisdictions also show that in at least some states courts refuse to bind the employer based upon a default judgment entered against a former employee.¹² If Utah were to adopt this rule of law, there would be no valid concern about prejudice to the employer based on a default judgment against the employee. At this point, this Committee cannot conclude that potential harm to the employer raises a significant concern.

Finally, the representation may have a detrimental impact on the former employee. Because the lawyer cannot receive any direction regarding the objectives of the representation, the lawyer runs the risk of acting in contravention to the desires of the former employee. If the former employee had decided not to make an appearance in the litigation because the former employee had consciously decided not to subject himself to the jurisdiction of the court, and if the lawyer took action that subjected the former employee to the jurisdiction of the court, then the former employee could be substantively prejudiced by the lawyer's actions.

In our opinion, the Rules of Professional Conduct are clear in prohibiting the unauthorized and unassisted representation of the former employee, and the potential concerns that support allowing representation of the former employee are not grounds for ignoring the Rules.

Summary: The lawyer may not ethically represent a vanished former employee unless the lawyer has an existing attorney-client relationship or the former employee agreed to the representation at the company's expense prior to vanishing and the lawyer complies with Rule 1.7. A lawyer who represents an employer may engage in limited acts that may serve to benefit the vanished former employee provided the lawyer acts on behalf of the employer as the employer's lawyer and does not purport to act on behalf of the vanished former employee or as the vanished former employer's lawyer.

Footnotes

1. The Committee's opinions can be found at http://www.utahbar.org/rules_ops_pols/Welcome.html.

2. For example, we assume that neither the employer nor employee are likely to have and pursue a claim against the other with respect to the matter. See Utah Rules of Professional Conduct 1.13(e) (2004).

3. It may also be that the employer's defense lawyer has

been retained by the insurance carrier. However, this factor does not play a role in our analysis.

4. Utah Rules of Professional Conduct, Scope, 1 (2004).

5. As evidenced by the Committee's change of ultimate position with respect to the original opinion on this matter, the matter has raised difficult issues that have rendered it a close call for some members of the Committee.

6. *Dunkley v. Shoemate*, 515 S.E.2d 442, 444 (N.C. 1999), quoting *Johnson v. Amethyst Corp.*, 463 S.E.2d 397, 400 (N.C. App. 1995) ("no person has the right to appear as another's attorney without the authority to do so, granted by the party for which he is appearing").

7. Although it might be presumed that the former employee does not want a default judgment entered, this may not always be the case. Occasionally, people decide not to defend lawsuits. If the former employee had decided not to defend the lawsuit, the attorney would not be abiding by those wishes. It is even possible to imagine other cases where an employee would want a judgment taken to protest or highlight an employer's alleged misconduct.

8. See, e.g., Utah Ethics Advisory Op. 97-01, 1997 WL 45140 (Utah St. Bar); Fla. Comm. on Professional Ethics Op. 77-2, 1977 WL 23165 (Fla. St. Bar Ass'n).

9. See, e.g., Philadelphia Bar Op. 98-8; So. Car. Bar Op. 98-07; So. Dak. Bar Op. 92-6.

10. This authorization for representation may be withdrawn by the employee or former employee. Utah Rules of Professional Conduct 1.16(a)(3) (2004).

11. See *Lima v. Chambers*, 657 P.2d 279 (Utah 1982); *Chatterton v. Walker*, 938 P.2d 255 (Utah 1997). In both of these cases, the Utah Supreme Court allowed insurers to invoke Rule 24 of the Utah Rules of Civil Procedure to intervene in negligence lawsuits in which their insureds sued uninsured defendants with the hope of proving negligence of the uninsured driver and collecting uninsured driver benefits from the plaintiffs' insurer. The *Chatterton* court suggested that the insurer's ability to intervene for the purpose of contesting liability has constitutional foundations. 938 P.2d at 260.

12. "Courts hold that in actions against several defendants jointly, where the defense interposed by the answering defendant is not personal, but common to all, as where it goes to the whole right of the plaintiff to recover at all, as distinguished from his or her right to recover as against any particular defendant, or where it questions the merits or validity of the plaintiff's entire cause of action or his or her right to sue, such defense, if successful, inures to the benefit of the defaulting defendants, with the result that final

judgment must be entered not merely in favor of the answering defendant, but also in favor of the defaulting defendants." 46 Am. Jur. 2d *Judgments* § 282. See also *Brazos Valley Community Action Agency v. Robinson*, 900 S.W.2d 843 (Tex. App. 1995) (employees default could not be binding on the employer; the appellate court also noting that the employer did not have authority to answer on behalf of the employee.); *Gearhart v. Pierce Enterprises, Inc.*, 779 P.2d 93 (Nev. 1999) (suit against a principal and surety; default judgment against the principal was not binding on the surety).

Rules Cited:

1.2

1.4

1.7

1.8

1.16

3.1

3.2