

Utah Ethics Opinions

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UTAH STATE BAR

Ethics Advisory Opinion Committee

Opinion 04-06

December 2, 2004

Issue: Under what circumstances is it permissible for corporate counsel to assert that counsel concurrently represents present and former corporate employees whose testimony is relevant to a claim and ethically preclude opposing counsel's access to those corporate employee witnesses?

Opinion: If corporate counsel has actually formed an attorney-client relationship with these employee-witnesses, and has fully complied with Utah Rules of Professional Conduct 1.7 (including obtaining informed consent from all multiple clients to joint representation and informing them of the possible need for withdrawal from representing any of them should an actual conflict arise), this is permissible and opposing counsel may not interview them. However, in the absence of such a fully formed and proper attorney-client relationship, it is improper for corporate counsel to block opposing counsel's access to other current corporate constituents, by asserting an attorney-client relationship unless these individuals were control group members, their acts could be imputed to the organization or their statement would bind the corporation with respect to the matter under Utah Rules of Professional Conduct 4.2. Similarly, it is improper to block opposing counsel's access to any former employee in the absence of a current fully formed and proper attorney-client relationship.

Facts: The tort action asserts one corporate employee and an outside individual were negligent, but names only the corporate entity (and the outside individual) as defendants. Counsel for plaintiff seeks to interview other employees who are fact witnesses and who are not alleged to be negligent. Corporate counsel informs plaintiff's counsel that s/he is representing all corporate employees (current as well as former employees) and thus plaintiff's counsel may not informally interview any of these individuals without violating Rule 4.2.

Analysis: Whether corporate counsel's actions are proper must be determined by reference

to Rule 1.7 regarding conflicts of interest, Rule 4.2 as it governs counsel's ability to interview "represented persons" in the corporate context, and Rule 3.4 as it permits corporate counsel to request that corporate employees not talk with opposing counsel.

Rule 4.2 1 provides in relevant part:

(a) General Rule. A lawyer who is representing a client in a matter shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by [other law or judicial order].

Utah's Rule 4.2 2 expressly addresses "Organizations as Represented Persons" and defines when an individual constituent of that organization, not separately represented, should be considered to be "represented" by corporate counsel. With respect to non-governmental organizations, Rule 4.2 states:

(c)(1)(B) When the represented "person" is an organization, an individual is "represented" by counsel for the organization if the individual is not separately represented . . . and . . . is known by the lawyer to be

(c)(1)(B)(i) a current member of the control group of the represented organization; or

(c)(1)(B)(ii) a representative of the organization whose acts or omissions in the matter may be imputed to the organization under applicable law; or

(c)(1)(B)(iii) a representative of the organization whose statements under applicable rules of evidence would have the effect of binding the organization with respect to proof of the matter.

Accordingly, whether or not the corporate attorney had formed an individualized attorney-client relationship with a particular corporate employee, this rule would prohibit the opposing counsel from interviewing any current member of the "control group" or any current employee whose acts or omissions would be imputed to the corporation or whose statements would be imputed to the corporation. Under these circumstances the employee would be acting and speaking for the corporation.³

Here, however, the opposing attorney posits that the employee is NOT a "person" "represented" by corporate counsel due to any of these factors, but a mere fact witness whom corporate counsel has (inexplicitly in opposing counsel's view) undertaken to represent as well.

Utah Rules of Professional Conduct 3.4, "Fairness to opposing party and counsel" must also be consulted. This rule is designed to permit both counsel to have access to relevant evidence in order that the adversary system function appropriately. Under Rule 3.4(f), a lawyer ordinarily may not ask a person who is not the lawyer's client "to refrain from voluntarily giving relevant information to another party" with one exception relevant here. There is an exception to this prohibition if "[t]he person is . . . an employee or other agent of a client; and (2) [t]he lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information."⁴ Thus, in accordance with this rule, corporate counsel may request any current employee (including fact witnesses) whose interests will not be adversely affected to refrain from informally speaking with opposing counsel. However, corporate counsel may not direct opposing counsel not to contact corporate employees who have the right to talk or to decline to talk to opposing counsel, unless, of course, these corporate employees are actually individually represented by corporate counsel.

The situation posits corporate counsel taking one further step, making all employees who have any information about the issue individual clients, and thus conclusively preventing opposing counsel from informally contacting any of them. The first question in analyzing whether this strategy is ethical is whether these employee-fact-witnesses have actually formed an individual attorney-client relationship with corporate counsel. If they have not, corporate counsel would be guilty of violating Rule 3.4 in unlawfully obstructing access to these witnesses and Rule 4.1 in making a false statement of material fact.⁵

It is permissible for corporate counsel to undertake to represent an employee opposing counsel believes is a mere fact witness provided there is no actual conflict of interest (Rule 1.7(a)) between the corporation and the employee-witness with respect to the matter and provided corporate counsel fully complies with Rule 1.7(b) regarding potential conflicts of interest. Such compliance would require that all clients (the corporation and each employee-witness) be fully informed as to the implications of common representation, and give consent to common representation after such advice. The advice should include the possibility that if a conflict of interest arises between the corporation and the witness, counsel may be required to withdraw from the representation entirely.⁶

It may be helpful to illustrate a possible scenario where common representation might be undertaken and a scenario where it should not be. Imagine allegations that the corporation has been negligent due to the acts of one employee, and the named employee, the corporation and all other employee witnesses tell counsel that the alleged negligent act never occurred. Under these circumstances,

counsel should be able to obtain informed consent to represent the corporation, the alleged negligent employee and other employee witnesses, should they all desire representation. However, if one employee witness will testify that the negligent act occurred and the employee alleged to be negligent denies the act; then clearly corporate counsel cannot represent both (and might be required to withdraw from the representation entirely if this came to light after common representation had been undertaken).

We also interpret Rule 1.7 to be consistent with Rule 3.4. If an employee's interest might be adversely affected by refraining from giving information to opposing counsel under Rule 3.4, then a conflict of interest exists such that common representation should not be permitted under Rule 1.7. For example, if the corporate employee had suffered the same discrimination as that complained of in the claim against the corporation, it would be impermissible for corporate counsel to undertake to represent this employee fact witness in the case.

While corporate counsel may certainly consult with the corporate constituent called as a witness in a deposition, this consultation is part of counsel's representation of the corporation and does not render the attorney counsel to the witness as an individual. Nor does such corporate representation block opposing counsel's ability to attempt to interview such a fact witness separate and apart from formal discovery.

Finally, we note that, in prohibiting communications with persons represented by counsel, Utah's Rule 4.2(a) provides explicit exceptions: "the lawyer . . . is authorized to do so by: . . . (2) decision . . . of a court of competent jurisdiction; (3) a prior written authorization by a court of competent jurisdiction obtained by the lawyer in good faith. . . ." Accordingly, an attorney who seeks to informally interview employees who are mere fact witnesses has the possibility of having this issue resolved by the court.⁷

Footnote

1. This portion of Utah Rules of Professional Conduct 4.2 (2004) is identical to ABA Model Rule 4.2 (1993). This Committee has previously opined regarding when Rule 4.2 prohibits or permits contact with various persons in Utah Ethics Advisory Op. No. 04-04, 2004 WL 1921150 (Utah St. Bar) (contact with former employees of opposing party permitted), Utah Ethics Advisory Op. No. 98-07, 1998 WL 493028 (Utah St. Bar) (contact with insurance adjuster), Utah Ethics Advisory Op. No. 96-01, 1996 WL 227376 (Utah St. Bar) (contact with former plaintiffs whose claims have been settled), Utah Ethics Advisory Op. No. 95-05, 1996 WL 73351 (Utah St. Bar) (relationship to U.S. Department of Justice regulation purporting to authorize certain ex parte contacts), and Utah Ethics Advisory Op.

No. 113 (1991), 1991 WL 634794 (Utah St. Bar) (counsel for individual members of tribe communicating with Tribal Counsel). None of these opinions is determinative in this case.

2. The ABA Model Rules include these concepts in the Comment to Rule 4.2, as did Utah before the current version was adopted in 1999. See *Featherstone v. Scharrer*, 34 P.3d 194 (Utah 2001) interpreting Utah's prior Rule 4.2 to prohibit contacts with the corporation's secretary given this language in the Comment to the rule.

3. This interpretation of prior Utah Rule 4.2, which included these provisions in the Comment rather than in the text of the rule itself, was adopted by the Utah Supreme Court in *Featherstone v. Scharrer*, 34 P.3d 194, 201 (Utah 2001).

4. Utah Rules of Professional Conduct 3.4(f)(1),(2)(2004).

5. Utah Rules of Professional Conduct 4.1(a)(2004) provides: "In the course of representing a client a lawyer shall not knowingly: (a) [m]ake a false statement of material fact or law to a third person."

6. See Utah Rules of Professional Conduct 1.9 and Utah Ethics Advisory Op. No. 96-11, 1996 WL 45138 (Utah St. Bar) (attorney appointed to represent both mother and father in an abuse/neglect proceeding must withdraw from representing either of them after a conflict of interest arises).

7. See e.g., *Shearson Lehman Brothers, Inc. v. Wasatch Bank*, 139 F.R.D. 412 (D. Utah 1991) (brokerage firm sought and obtained court's permission to conduct ex parte interviews with former bank employees where bank was represented by counsel).

Rules Cited:

1. 7

3.4 4.1 4.2