

13-01

Opinion No. 13-01

Utah Ethics Opinion

Utah State Bar Ethics Advisory Opinion Committee

April 9, 2013

ISSUE

When a lawsuit or claim is filed against a government entity, the attorney's office of that entity sends all relevant employees an e-mail including a litigation hold notice and certain questions regarding the location of documents possibly relevant to the pending claim. If the claim has been brought by an employee, such as an employment discrimination claim, the complaining employee would also receive the e-mail. In this situation, does the attorney's office sending this e-mail to all relevant employees, including a represented plaintiff or complaining employee, constitute a violation of Utah Rule of Professional Conduct 4.2?

OPINION

It is a violation of Rule 4.2 for a government entity's attorney's office to send a litigation hold e-mail to an adverse represented employee because the e-mail relates to the subject of litigation and none of the exceptions listed in Rule 4.2 apply.

ANALYSIS

This issue is controlled by Rule 4.2. Rule 4.2(a) provides that:

In representing a client, a lawyer 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. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client if authorized to do so by any law, rule, or court order, in which event the communication shall be strictly restricted to that allowed by the law, rule or court order, or as authorized by paragraphs (b), (c), (d) or (e) of this Rule.

The referenced exceptions in Paragraphs (b), (c), (d), and (e) deal with, respectively, cases involving unbundled legal services, government lawyers engaged in civil or criminal enforcement matters, organizations as represented persons,

and inquiries about privileged communications and settlement. The Committee does not express an opinion regarding these specific, enumerated exceptions, but instead addresses the issue presented only under Paragraph (a)'s general requirement [1]

Rule 4.2(a) prohibits an attorney from communicating with a represented party "about the subject of the representation." The term "subject of the representation" is not clearly defined by the Rule. However, Comment 5 to the Rule indicates that an ex parte contact with a represented party might be acceptable if "the communication is outside the scope of the representation" or "regarding a separate matter." *See* Utah R. Prof. Cond. 4.2 at cmt. 5. This language demonstrates that the closer the subject of communication is to the case at issue, the more likely it will violate the Rule. It also indicates that for a communication to be acceptable, it must relate to a different topic that is unrelated to the case in which the party is represented.

The hypothetical communication described in the issue here presented relates to the subject of the representation. The e-mail requests that the employee preserve all documents related to the represented party's claims and answer questions about those documents' location. Although there is presumably little substantive information requested or exchanged, the communication is not "outside the scope" of the representation or related to "a separate matter." *See* Utah R. Prof. Cond. 4.2 at cmt. 5. Therefore, the proposed e-mail would be a communication about the subject of the representation.

The communication at issue is also unlikely to be permissible as provided by "any law, rule, or court order." Although the Utah Rules and comments do not elaborate on what constitutes a rule or law under this provision, this Committee and other jurisdictions have noted that this exception generally includes things such as the exercise of constitutional or legal rights to communicate with the government or government agents' investigation prior to commencement of criminal proceedings. *See* Utah Ethics Advisory Opinion No. 95-05; *see also* ABA Model R. Prof. Cond. 4.2, cmt. 5.

One rule or law that might arguably apply is the government entity's obligation to preserve evidence. However, that obligation requires only that the government entity preserve evidence related to the matter at issue. It does not require the government entity's attorney to communicate directly with the represented party. For example, the government attorney could send the litigation hold e-mail to all relevant employees except the represented party, and send a similar e-mail to the represented party's

attorney. The government entity could also prepare a form to hold e-mail to be sent in all cases from a supervisor or HR representative rather than from an attorney.[2] The Committee has not been directed to any specific statute or rule that would require the government attorney to directly contact a represented party in order to fulfill his or her obligation to preserve evidence.

Notes:

[1] The exception in paragraph (c) provides that where a government lawyer is involved in a matter of civil or criminal enforcement, he or she may communicate with a represented party if: (1) the communication is limited to an investigation of a different, unrelated matter; (2) the communication is made to protect against an imminent risk of death or serious bodily harm or substantial property damage; (3) the communication is made at the time of the arrest of the represented person and the person knowingly and voluntarily waives his or her rights to remain silent and to an attorney; or (4) the communication is initiated by the represented person, and the represented person has given a written or recorded voluntary and informed waiver of counsel. *See* Utah R. Prof. Cond. 4.2(c). Because the inquiry raised in your letter addresses a government lawyer defending against a claim by an employee, these exceptions do not directly apply.

[2] Such a form-e-mail from someone other than the lawyer must not violate Rule 8.4(a), which provides that a lawyer must not "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." However, so long as the lawyer is not so involved in creating it for a particular individual that the e-mail is essentially a communication from the lawyer "through the acts of another," such a form e-mail would be permissible. *See* Utah R. Prof. Cond.4.2, cmt. 6 ("Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication the client is legally entitled to make").
