Utah Ethics Opinions

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113. USB EAOC Opinion No. 113

Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 113

Approved March 14, 1991

Issue: May a lawyer, in representing individual members of an Indian tribe, communicate with the Tribal Council or with tribal officers in their official capacity concerning federal legislation that the lawyer has proposed on behalf of his clients, when the communication is made without the consent of the lawyer who represents the tribe and has proposed competing federal legislation on the same matters?

This opinion does not address the propriety of attorney contacts with a tribal council or tribal officials concerning matters in litigation. As to those communications, different considerations apply.1 We offer no opinion on the interpretation of the Rules of Professional Conduct in that context.

Opinion: Rule 4.2 of the Rules of Professional Conduct prohibits a lawyer, in representing a client, from communicating with a party that the lawyer knows is represented by another lawyer in the matter, unless the other lawyer consents to the communication or the communication is "authorized by law." Members of an Indian tribe are "authorized by law" to communicate their will, through counsel, to their duly elected or appointed tribal officials on political matters such as proposed federal legislation that may affect the tribe and its members. Rule 4.2 therefore does not prohibit a lawyer, in representing individual members of the tribe, from communicating about such legislative matters with the Tribal Council, or with tribal officers in their official capacity,2 even though the tribe's lawyer has not consented to the communication.

Rationale: Rule 4.2 of the Rules of Professional Conduct prohibits a lawyer from communicating "about the subject of [his or her] representation with a party 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 by law to do so." The main thrust of this rule is "to prevent situations in which a represented party may be taken advantage of by adverse counsel . . . ."3

The courts have developed various approaches for determining whether an individual or group is a "party" within the meaning of the rule, when the situation involves an organization.4 Rule 4.2 takes perhaps the broadest approach in defining the term "party." The official comment to Rule 4.2 states:

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

A tribal council, which has authority to speak for and bind the tribe, falls under this definition. Individual tribal officers acting in their official capacity may or may not fall under this definition, depending on the particular facts of the case and the structure of the tribal government.

Even assuming that a tribal council and tribal officers are parties within the meaning of Rule 4.2, however, communications by a lawyer who represents individual members of the tribe on political matters such as proposed federal legislation fall under the exception for communications that are "authorized by law." The official comment to Rule 4.2 states that "[c]ommunications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter." This language suggests that the authors of the rule were sensitive to the First Amendment rights of individuals to petition the government for a redress of grievances.

The right to petition one's government "is implicit in `[t]he very idea of government, republican in form.'"5 Individuals therefore have the right to communicate their will to the government and elected officials,6 and may do so through legal counsel so that their voice will be effective.7 While First Amendment rights can be limited when a state enacts a rule that is narrowly tailored to achieve a compelling state interest,8 "a state may not, under the guise of prohibiting professional misconduct ignore constitutional rights."9

Members of an Indian tribe have similar statutory and constitutional rights to communicate their will, through counsel, to their duly elected or appointed tribal officials and government.10 The right to communicate with a tribal council or tribal officers in their official capacity is particularly important in political matters, such as proposed federal legislation that will affect the tribe and its members. In this context, communication between the tribal

government and its constituency is essential so that tribal officials can be fully and fairly informed of all sides of the relevant issues.11

We are therefore of the view that communications between a lawyer representing individual members of a tribe and their duly appointed or elected Tribal Council or officers concerning political matters such a proposed federal legislation are communications that are "authorized by law" and are therefore outside the proscription of Rule 4.2.12 While nothing requires the Tribal Council or officers to listen to individual tribal members or their advocates,13 the state should not, and perhaps cannot, inhibit such communication through its interpretation of the Rules of Professional Conduct.

Footnotes

1. *See infra* note 11.

2. Rule 7.3 of the Rules of Professional Conduct would generally prohibit an attorney from contacting tribal officials to solicit their business in their individual capacity.

3. *Wright v. Group Health Hosp.*, 103 Wash. 2d 192, 691 P.2d 564, 567 (1984) (en banc) (construing DR7-104(A)(1)).

4. *See, e.g., id.* at 568-69.

5. *McDonald v. Smith*, 472 U.S. 479, 482 (1985), quoting *United States v. Cruikshank*, 92 U.S. 542, 552 (1876); see U. S. CONST. amend. I.

6. 472 U.S. at 482.

7. *See NAACP v. Button*, 371 U.S. 415, 428-29 (1963).

8. *Id.* at 433, 438.

9. *Id.* at 439; *see also Smith v. Arkansas State Highway Empl.*, Local 1315, 441 U.S. 463, 464 (1979) ("The government is prohibited from infringing upon these guarantees . . . by a general prohibition against certain forms of advocacy . . . .")

10. *See* 25 U.S.C. § 1302(1) (1983 & Supp. 1990) (Indian "bill of rights"); S. Rep. No. 721, 90th Cong., 2d Sess., reprinted in 1968 U.S. Code Cong. & Admin. News 1837, 1864 (views of Senator Sam J. Ervin, Jr.).

11. In contrast, the balance of factors may be entirely different in the context of litigation. *See, e.g., Frey v. Department of Health & Human Serv.*, 106 F.R.D. 32, 35 (E.D.N.Y. 1985) (recognizing limits on communication with government officials in context of litigation); *International Graphics. Div. Moore Bus. Forms, Inc. v. United States*, 5 Ct. Cl. 97, 98-100 & n.5 (1984) (same). In the context of litigation, the potential for unfair prejudice to the tribe and its officers from non-consensual communications would be much greater, since their acts and statements might be used against them. See Rules of Professional Conduct 4.2 comment.

12. *See State v. Linquist*, 674 P.2d 1234, 1237 (Utah 1983) (statutes should be construed to avoid constitutional infirmities); *Stahl v. Utah Transit Auth.*, 618 P.2d 480, 481 (Utah 1980) (statutes should be construed in harmony with other relevant statutes); *In re Gillis*, 297 Or. 493, 686 P.2d 358, 362 (1984) (en banc) ("authorized by law" does not mean that the particular mode of communication must be authorized).

13. *See, e.g., Smith*, 441 U.S. at 465.

Rule Cited:

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