Utah Ethics Opinions

1996.

96-01. USB EAOC Opinion No. 96-01

Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 96-01

Approved April 26, 1996

Issue: May a lawyer representing a defendant in multiple lawsuits asserting similar claims initiate and conduct *ex parte* communications with former plaintiffs who have settled their claims? **Opinion:** Yes, but only if the settling plaintiffs are not represented by counsel and only after appropriate disclosures have been made by the lawyer to the settling plaintiffs.

Facts: A lawyer's corporate client has been and is a defendant in multiple civil lawsuits. Certain lawsuits have been settled and others are pending. Most of the current lawsuits were filed by the same plaintiffs' lawyers who represented the individuals whose claims have been settled. (fn1)

The lawyer's client believes that random audits of the records of current claimants reveal a lack of basis for many of the claims asserted. The client desires to bring an action against the claimant lawyers who, in the client's view, have asserted meritless current claims.

The client has asked the lawyer to interview some of the individuals who brought settled claims that the client believes were supported by false or questionable evidence. The objective of this investigation is to acquire evidence, if any, that the claimant lawyers knowingly recruited clients and deliberately submitted on behalf of those clients claims that were supported by fabricated evidence.

The client wants the lawyer to ask the settling plaintiffs to disclose what their lawyers told them about bringing the settled claims. The proposed communications with the settling plaintiffs would be initiated by the lawyer for the corporate client. The lawyer would not inform counsel who represented settling plaintiffs of these communications.

The client has advised the lawyer that it has no intention to seek redress from any of the individuals who have settled their claims. (fn2) Times to appeal or reopen have generally expired.

Analysis: The Utah Rules of Professional Conduct contain two basic rules regarding contact with persons who are not the lawyer's client. The first is found in Rule 4.2, which forbids contact with represented parties, and the second is found in Rules 4.3 and 4.4, which govern contact with unrepresented parties and third persons.

Rule 4.2

The relevant portion of Rule 4.2 of the Utah Rules of Professional Conduct states:

In representing a client, a lawyer shall not communicate about the subject of the 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. (fn3)

Discussion of the last phrase of this Rule is quickly concluded: The corporation's lawyer does not have consent (and indeed wants to initiate the conversation without notifying plaintiffs' counsel) and does not propose to obtain a court order authorizing the communication.

Analysis of the first phrase of the Rule is more difficult and involves a discussion of whether the settling plaintiffs are "represented by another lawyer in the matter." The issue is fact-specific and the burden of determining the person's represented status is on the contacting lawyer. Under Utah law, in the absence of "disturbing events or special arrangement," a lawyer's employment comes to an end and the attorney-client relationship is terminated with the completion of the specific task for which the lawyer was employed. (fn4) Utah courts generally follow the common law rule that the employment of the defendant's lawyer terminates upon entry of judgment, while the employment of the plaintiff's lawyer terminates upon satisfaction of judgment.

In our situation, the question is whether the relationship between certain plaintiffs and their lawyer has terminated. We assume that final judgment has been entered on the settlement offered by defendant and accepted by plaintiff. The corporation's lawyer, who desires to question those plaintiffs, must determine whether the judgment has been satisfied and whether there are other special circumstances that might rebut the presumption that the attorney-client relationship has thus terminated. (fn5)

If the settling plaintiffs are still represented by counsel, or if the corporation's lawyer cannot confirm that the relationship between the settling plaintiffs and their counsel has terminated, Rule 4.2 would prohibit the proposed

communications.

Careful attention to the current relationship between the settling plaintiffs and their counsel may allow the corporation's lawyer to contact the settling plaintiffs without violating Rule 4.2. The burden of showing compliance with Rule 4.2 is, however, on the corporation's lawyer.

Rules 4.4 and 4.3

Compliance with Rule 4.2 does not end the inquiry. The corporation's counsel must also follow the Utah Rules of Professional Conduct on contacting unrepresented parties and third persons.

Utah Rule of Professional Conduct 4.4 states:

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

The proposed communications with settling plaintiffs raise concerns under both parts of Rule 4.4.

First, the proposed communications would not be proper if they have no substantial purpose other than to embarrass, delay, or burden a third person. The client in this case is a defendant in ongoing litigation in which the lawyers it proposes to investigate represent plaintiffs. The question of whether the proposed communication "have no substantial purpose other than to embarrass, delay, or burden" plaintiffs or their lawyers in that litigation is a question of fact that should be considered and resolved.

Second, the proposed communications could constitute a "method of obtaining evidence that violates the legal rights" of the settling plaintiffs. In particular, any attorney-client privilege is a "legal right" of the settling plaintiffs within the meaning of Rule 4.4. (fn6)

Under Utah law the privilege would not attach to communications that the client knew or should have known were made for the purpose of facilitating a fraud. (fn7) If no privilege exists, the proposed communications would not violate any legal right of the settling plaintiffs. If the privilege exists, requesting this information without appropriate disclosure is a method of obtaining evidence that would violate Rule 4.4 by violating the settling plaintiffs' legal rights to maintain the attorney-client privilege. (fn8)

The settling plaintiffs can waive the protection of the privilege and, in fact, may do so by answering questions from the corporation's lawyer. These settling plaintiffs are likely to be lay persons who are generally uninformed about their rights with respect to the attorney-client privilege. Waiver of the privilege in this case may subject the settling plaintiffs to civil or criminal liability for their participation in presenting false or fraudulent claims to the court.

Therefore, in order for the corporation's lawyers to comply with Rules 4.4 and 4.3 (fn9) in contacting the settling plaintiffs, they must make sufficient disclosures. Based upon the Rules, ethics opinions and case law, at least the following should be discussed:

Identify the interviewer as a lawyer. (fn10)

Disclose who the lawyer is representing. (fn11)

Disclose the nature of the lawyer's representation, including the fact that the person's former lawyer may be an adverse party. (fn12)

Ask if the person is currently represented by counsel. (fn13)

Clarify that the lawyer is not representing the interviewee. (fn14)

Clarify that the interviewee is not required to answer questions or supply information and that the interviewee may have counsel present. (fn15)

Clarify that an attorney-client privilege may protect discussions between the interviewee and the interviewee's counsel in the settled lawsuits, and that disclosing any of the contents of such discussions could waive that privilege as to all of the contents of such discussions so that anyone could find them out.16

It is the lawyer's burden in this case to ensure that the lawyer's actions will not violate the Rules of Professional Conduct. Assuming the settling plaintiffs are not represented by counsel and adequate disclosures are made, the corporation's lawyer may contact the settling plaintiffs.

Footnotes

1. Although some of the lawsuits are class actions, all of the settling plaintiffs either opted out or never were members of a class. Accordingly, this opinion does not address issues relating to members of a class currently or formerly represented by class counsel.

2. The client is willing to authorize the lawyer to execute releases of any claims it might have against the former claimants (although not against the lawyers). Disclosure of facts showing that they participated in the filing of fraudulent claims could expose the individuals to criminal prosecutions or third-party claims. The proposed release could not insulate the individuals from such claims. Accordingly, this opinion does not consider the proposed

release as a factor.

3. Rule 4.2 was amended effective April 1, 1996, by the addition of two sentences dealing with *ex parte* contacts of government officials. The change has no effect on the analysis in this opinion.

4. *Sandall v. Sandall*, 193 P. 1093 (Utah 1920) (the attorney-client relationship ended with respect to the divorce, even though a relationship with the same lawyer existed with respect to criminal matters); Atkinson v. Atkinson, 490 P.2d 729 (Utah 1971) (child custody modification considered a separate employment from the original divorce/custody proceeding); Shulder v. Dickson, 243 P. 377 (Utah 1928) (appeal considered a separate employment from the original lower court matter).

5. *See also* ABA Formal Op. 95-396, "Communications with Represented Persons" (1995). In the context of contact with a person who is known to have been represented by counsel, the communicating lawyer should not proceed without reasonable assurance that the representation has in fact been terminated. "As a practical matter, a sensible course for the communicating lawyer would generally be to confirm whether in fact the representing lawyer has been effectively discharged."

6. ABA Formal Op. 91-359, "Contact with Former Employee of Adverse Corporate Party" (1991). In the context of *ex parte* communications with former employees of an adverse corporate party, "with respect to any unrepresented former employees, of course, the potentially communicating adversary attorney must be careful not to seek to induce the former employee to violate the privilege attaching to attorney-client communications to the extent his or her communications as a former employee with his or her former employer's counsel are protected by the privilege. . . . Such an attempt could violate Rule 4.4."

7. *See State v. Carter*, 578 P.2d 1275 (Utah 1978); In re September 1975 Grand Jury Term, 532 F.2d 734 (10th Cir. 1976); Utah R. Evid. 504(d)(1).

8. *Cf. Shearson Lehman Brothers, Inc. v. Wasatch Bank*, 139 F.R.D. 412 (D. Utah 1991) (noting ABA Formal Op. 91-359); *Dubois v. Gradco Systems, Inc.*, 136 F.R.D. 341, 347 (D. Conn. 1991) (efforts by counsel to induce or listen to privileged communications may violate Rule 4.4); *Brown v. St. Joseph County*, 148 F.R.D. 246, 255 (N.D. Ind. 1993) (counsel must refrain from seeking, inducing or listening to the disclosure of any matter protected by the attorney-client privilege). Shearson Lehman concerned an attempt to contact the former employees of an opposing corporate party under circumstances where the former employees might waive the corporate party's attorney-client privilege. Here, the settling parties themselves are the holders of any applicable privilege.

9. Rule 4.3 states:

(a) During the course of a lawyer's representation of a client, the lawyer shall not give advice to an unrepresented person other than the advice to obtain counsel.

(b) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Because we assume for purposes of this Rule 4.4 discussion that the settling plaintiffs are no longer represented by counsel, Rule 4.3(a) would prohibit the corporation's lawyer from providing any advice other than the advice to obtain counsel. The ABA notes that the offer of an opinion on legal issues in support of a position, where the opinion is not proffered as advice to the unrepresented person, does not violate Rule 4.3(a). ABA Informal Op. 1502 (1983).

10. Rules 4.3 and 4.1; *Shearson Lehman*, 139 F.R.D. at 418 (lawyer to make clear the nature of his role).

11. Rule 4.3(b); *Shearson Lehman*, 139 F.R.D. at 418; *University Patents v. Kligman*, 737 F. Supp. 325 (E.D. Pa. 1990); *Siguel v. Trustees of Tufts College*, 1990 WL 29199 (D. Mass. 1990); *Lizotte v. NYC Health & Hosp. Corp.*, 1990 WL 267421 (S.D.N.Y. 1990).

12. Rules 4.4, 4.3, and 4.1; *Shearson Lehman*, 139 F.R.D. at 418 (lawyer to identify client and fact that interviewee's former employer is an adverse party); *University Patents*, 737 F. Supp. at 328; *Tufts College*, 1990 WL 29199, *7.

13. Rule 4.2; *Upjohn v. Aetna Cas. and Sur.*, 768 F. Supp. 1186, 1215 (W.D. Mich. 1990). Of course, once a settling plaintiff seeks independent legal counsel for advice, the corporation's lawyer is prevented by Rule 4.2 from contacting the settling plaintiff directly.

14. Rule 4.3(b).

15. *In re Domestic Air Transport Antitrust Litigation*, 141 F.R.D. 556, 562 (N.D. Ga. 1992); *University Patents*, 737 F.Supp. at 328; *Tufts College*, 1990 WL 29199, *7; *Lizotte*, 1990 WL 267421, *5.

16. Rules 4.4 and 4.3.

Rules Cited:

4.24.34.4