

Utah Ethics Opinions

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UTAH STATE BAR

Ethics Advisory Opinion Committee

Opinion No. 00-05

Approved December 1, 2000

¶ 1 **Issue:** Where a defendant is being represented by a lawyer appointed by defendant's insurance carrier prior to the entry of any judgment against the defendant, would it be ethical for plaintiff's lawyer to convey a settlement offer proposing that plaintiff take an assignment of any bad-faith claim that the defendant might have against the insurance carrier in exchange for plaintiff's agreement not to execute against defendant for amounts exceeding the insurance policy limits?

¶ 2 **Opinion:** It is ethical for plaintiff's lawyer to communicate this offer of settlement to the defendant so long as the communication complies with Utah Rules of Professional Conduct 4.1 and 4.2. If the offer of settlement creates a conflict of interest for the defendant's insurance carrier-appointed lawyer, then the defendant's lawyer must fully comply with Rule 1.7. Counsel's presentation of plaintiff's settlement offer to advance plaintiff's interests is not unethical, even though it may place defendant's counsel in a conflict of interest.

¶ 3 **Facts:** In a lawsuit brought against Defendant by Plaintiff, Defendant is being represented by a lawyer appointed by Defendant's insurance carrier. There is the potential for a judgment against Defendant for an amount greater than the limits of the insurance policy. Prior to the entry of judgment (or even prior to the filing of a complaint), Plaintiff, through her lawyer, wishes to make a settlement offer to Defendant under which Plaintiff would accept an assignment of any bad-faith claims (fn1) Defendant might have against his insurance carrier in exchange for Plaintiff's agreement not to execute on any judgment against Defendant to the extent that a judgment would exceed the limits of the applicable insurance policy.

¶ 4 The request to the Committee questions whether Plaintiff's counsel's conveying such an offer of settlement has ethical ramifications if it creates a relationship between Plaintiff's lawyer and an adverse party that results in a conflict of interest for Defendant's counsel. The Committee

has been asked to consider the request under two assumptions: that the offer is conveyed (a) by a letter addressed to Defendant, in care of Defendant's counsel, and (b) by a letter addressed to Defendant, in care of the insurance adjuster for Defendant's insurance carrier. (fn2)

¶ 5 **Discussion:** The Committee has previously issued an opinion that provides guidance on this issue. In Opinion No. 98-05, (fn3) the Committee was asked if it was unethical for a defense lawyer to offer a "full satisfaction" settlement, conditioned upon a plaintiff's waiving a claim for attorneys' fees against defendant. The request suggested that these offers of settlement were unethical because they created a conflict of interest for plaintiff's counsel under Utah Rules of Professional Conduct 1.7(b), as plaintiff's counsel's interest in her fees might cloud her judgment as to the merits of the settlement. Opinion 98-05 states that defendant's counsel does not act unethically in making an offer of settlement that may create a conflict of interest for plaintiff's counsel. Defendant's counsel in that case has a duty to represent the interests of his client zealously within the limits of law. It is the duty of plaintiff's counsel to convey the settlement proposal to her client, to resolve any conflicts of interest arising under Rule 1.7(b), and to respond to the settlement proposal as dictated by her client.

¶ 6 The current request is governed by the same principles. We first observe that it is not for us to decide whether the proposed prejudgment assignment of bad-faith claims in exchange for a covenant not to execute for amounts exceeding insurance policy limits is enforceable. Whether such settlements are void as opposed to public policy or violate a provision of the insurance policy and invalidate insurance coverage are issues of law, not ethics. (fn4) If these issues arise, they must be resolved by the Utah courts.

¶ 7 So long as the offer of settlement is communicated in a manner that does not violate Rules 4.1 and 4.2, Plaintiff's lawyer does not act unethically in making the settlement offer. As we noted in Opinion 98-05, it is Plaintiff, not Plaintiff's counsel, who controls the settlement offer. It is Plaintiff's lawyer's duty to convey Plaintiff's offers to Defendant. It is the duty of defense counsel to convey the substance of these settlement offers to Defendant (fn5) and to accept or reject the settlement offers, as directed by Defendant. (fn6)

¶ 8 *Rule 1.7(b).* The settlement offer, if accepted, does not place Plaintiff's lawyer in a conflict of interest. The assignment to Plaintiff of Defendant's bad-faith claims against Defendant's insurance carrier does not make Plaintiff's lawyer the lawyer for Defendant. It does not create a relationship with an adverse party different from that created by an interim stipulation or partial settlement. It

is not different from a partial settlement by the parties to resolve all property-loss claims for a stipulated amount and agreement to proceed to trial on the personal-injury claims.

¶ 9 Similarly, nothing in the proposed settlement changes the alignment or interests of Defendant. The Committee assumes that, while the settlement agreement may require Defendant's later cooperation in Plaintiff's prosecution of the bad-faith claims against Defendant's insurance carrier, the settlement agreement does not provide for the cooperation or collusion of Defendant with respect to Plaintiff's underlying claims. Defendant's interests in the defense of the underlying claims are, therefore, no different after the assignment than if Defendant had insurance limits in excess of any exposure to liability.

¶ 10 If Defendant's counsel represents only Defendant, the settlement offer does not appear to create any potential conflict of interest for Defendant's counsel. The offer affords his client an opportunity to avoid any liability in excess of the insurance policy limits. This is clearly in Defendant's interest.

¶ 11 The settlement offer may create a conflict of interest for Defendant's counsel if he also represents the insurance carrier. In this circumstance, the lawyer's responsibilities to the insurance carrier may limit his ability to advise and counsel Defendant with regard to the settlement offer. Defendant's counsel may proceed with the representation only if he complies with Rule 1.7(b). However, the fact that a settlement offer may create a conflict of interest for defense counsel does not make the settlement offer inappropriate or Plaintiff's counsel's communication of the settlement offer unethical.

¶ 12 *Rules 4.1 and 4.2.* Plaintiff's lawyer's communication of the settlement offer must comply with Rules 4.1 and 4.2. (fn7) Rule 4.1(a) requires that Plaintiff's counsel not "make a false statement of a material fact or law" to Defendant in the settlement offer.

¶ 13 Rule 4.2(a) (fn8) requires that the settlement offer not be communicated directly to Defendant or to Defendant's insurance adjuster by Plaintiff's lawyer if she knows that the recipient of the offer is represented by a lawyer in the matter, unless that lawyer consents to the communication or the communication is otherwise authorized by Rules 4.2(a)(1), (a)(2), (a)(3) or (a)(4). For purposes of this Opinion, the Committee assumes that direct communication of the written offer of settlement has not been so authorized.

¶ 14 If the written offer of settlement, regardless of whom it is written to, is contained in an envelope addressed to and delivered to Defendant, it is an *ex parte* communication in violation of Rule 4.2(a), even if it is also addressed to and delivered to Defendant's counsel. (fn9) If the written offer,

regardless of whom it is written to, is contained in an envelope addressed only to Defendant or to Defendant in care of his lawyer, is delivered only to Defendant's lawyer, and Defendant's lawyer delivers the envelope unopened to Defendant, the communication is an *ex parte* communication in violation of Rule 4.2(a). In such cases, Defendant's lawyer is under no duty to open the envelope and may believe ethical or legal obligations require delivery of the envelope to Defendant unopened.

¶ 15 If the written offer, regardless whom it is written to, is contained in an envelope addressed to Defendant or to Defendant in care of Defendant's lawyer, is delivered only to Defendant's lawyer, and Defendant's lawyer opens the envelope and chooses to deliver the offer to Defendant, the settlement offer is not an *ex parte* communication in violation of Rule 4.2(a). In these cases, Defendant's lawyer has consented to the *ex parte* communication and may control the time, method and manner of communicating the offer. However, if the written offer is written to Defendant or to Defendant in care of his lawyer, and the lawyer chooses to deliver the written offer to Defendant, the content of the communication must comply with Rule 4.2(d)(1). (fn10)

¶ 16 Even if the *ex parte* communication is permitted by Rule 4.2(a) or (b), Rule 4.2(d)(1) prohibits the communication if it seeks to induce the person to forego representation or to disregard the advice of the person's counsel. Therefore, if the content of the communication contains statements derisive of Defendant's lawyer or Defendant's lawyer's representation of Defendant in the matter, such statements may and often will violate Rule 4.2(d)(1).

¶ 17 If the offer is written to Defendant or to Defendant in care of Defendant's lawyer and it is contained in an envelope addressed and delivered only to Defendant's lawyer, and Defendant's lawyer delivers the written offer to Defendant, Defendant's lawyer has consented to the *ex parte* communication and Rule 4.2(a) is not violated. (fn11) As in the prior case, the communication of the offer to Defendant is by Defendant's lawyer, who may control the time, method and manner of communicating the offer. If Defendant's lawyer delivers to Defendant the offer written to the Defendant or to Defendant in care of Defendant's lawyer, the content of the communication is subject to Rule 4.2(d)(1). (fn12)

¶ 18 *Communicating with the Insurance Adjuster.* If the offer of settlement is written to Defendant, in care of Defendant's insurance adjuster, and is delivered to Defendant's insurance adjuster, the communication may violate Rule 4.2(a). In our Opinion No. 98-07, (fn13) we stated that communications by a plaintiff's counsel directly to a defendant's insurance adjuster are improper if plaintiff's

counsel knows or reasonably should know that the insurer is represented by counsel in the matter. The Committee stated that, when the injured party and the insurance company have been unable to achieve resolution of the claim and the matter is in or likely to proceed to litigation, the plaintiff's lawyer reasonably should expect that the insurance company is represented by counsel in the matter.

¶ 19 Under these circumstances, direct contact with the insurance adjuster would be improper unless plaintiff's lawyer has affirmatively determined that the insurer does not consider itself represented by counsel in the matter. Clearly, if Plaintiff's settlement offer contemplates an assignment of bad-faith claims, Plaintiff has been unsuccessful in negotiations with the insurance carrier, and the matter would appear to be headed for litigation. It would, therefore, be unethical for Plaintiff's counsel to direct the settlement offer to Defendant in care of Defendant's insurance adjuster without first having affirmatively determined that the insurer does not consider itself represented by counsel in the matter.

¶ 20 Summary:

It is not unethical for Plaintiff's lawyer to convey the offer of settlement described in the request, as long as she does so in a manner complying with Rules 4.1 and 4.2. The offer of settlement must not, therefore, contain a false statement of material fact or law.

If Plaintiff's counsel knows Defendant is represented by a lawyer in the matter, she must not communicate the offer directly to Defendant unless his lawyer has consented to the communication or it is otherwise authorized by Rule 4.2(a).

If (a) Plaintiff's counsel places the offer in an envelope addressed to Defendant or to Defendant in care of his lawyer, (b) the offer is delivered only to Defendant's lawyer, and (c) that lawyer delivers the offer to Defendant unopened, this violates Rule 4.2. (fn14)

If (a) Defendant's lawyer opens the envelope addressed to him or his client, (b) the offer is written to Defendant or to Defendant in care of his lawyer, and (c) Defendant's lawyer chooses to deliver the offer to the Defendant, the offer does not violate Rule 4.2(a), but the content of the offer must comply with Rule 4.2(d)(1).

If (a) the offer is written to Defendant or to Defendant in care of his lawyer, (b) the offer is delivered only to Defendant's lawyer in an envelope addressed only to that lawyer, and (c) Defendant's lawyer delivers the offer to Defendant, the offer does not violate 4.2(a), but the content of the offer must comply with Rule 4.2(d)(1).

An offer of settlement contemplating assignment of bad-faith claims against Defendant's insurance carrier

would ordinarily not be made until after settlement negotiations have been unsuccessful with the insurance carrier, and the matter is likely to proceed to litigation. Therefore, the settlement offer should not be communicated directly by Plaintiff's counsel to the insurance adjuster for the insurance company unless Plaintiff's counsel has affirmatively determined that the insurer does not consider itself represented by counsel in the matter.

Footnotes

1. Bad-faith claims against an insurance carrier can arise in cases where (i) a defendant is protected up to fixed limits by an insurance policy, (ii) the insurance carrier unreasonably rejects an offer to settle the case at or below the policy limit, (iii) a judgment is ultimately rendered for an amount exceeding the policy limit, and (iv) defendant becomes liable for payment of the judgment amount in excess of that limit.

2. The request before the Committee does not involve circumstances of dishonesty, fraud, deceit or misrepresentation. See Rule 8.4(c).

3. Utah Ethics Advisory Op. 98-05, 1998 WL 199535 (Utah St. Bar).

4. The following authorities provide a discussion of these legal issues: *State Farm Fire and Casualty Co. v. Grady*, 925 S.W.2d 696 (Tex. 1996); *State Farm Mutual Auto Ins. Co. v. Peaton*, 812 P.2d 1002 (Ariz. App. 1990); *Assignability of Insured's Right to Recover Over Against Liability Insurer for Rejection of Settlement Offer*, 12 A.L.R.3d 1158 (1967 & Supp. 1999).

5. Utah Rules of Professional Conduct 1.4, Comment: "A lawyer who receives from opposing counsel an offer of settlement in a civil controversy . . . shall promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable."

6. Utah Rules of Professional Conduct 1.2(a): "A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter."

7. Utah Rules of Professional Conduct 4.1, 4.2 (2000).

8.(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:

(1) constitutional law, statute, or an agency regulation

having the force of law;

(2) a decision or a rule of a court of competent jurisdiction;

(3) a prior written authorization by a court of competent jurisdiction obtained by the lawyer in good faith; or

(4) paragraph (b) of this rule [relating to government lawyers engaged in law enforcement].

Utah Rules of Professional Conduct 4.2(a) (2000). Note that, effective February 1, 1999, the Utah Supreme Court adopted a version of Rule 4.2 that is substantially different from ABA Model Rule 4.2. However, the differences primarily involve attorneys engaged in law enforcement and do not substantially change our analysis in this Opinion.

9. Unless Rule 4.2(a) is complied with, a settlement offer may not be communicated by a lawyer directly to the adverse party even if a copy is simultaneously delivered to the adverse party's lawyer. *See, e.g.*, Penn. Bar Ass'n, Op. 94-167 (Nov. 10, 1994). It is unethical for an attorney to send a copy of a letter concerning the subject of the representation to a represented opposing party, even if the opposing party's attorney is copied on the letter, unless the attorney has the consent of the represented party's attorney or unless the attorney is authorized by law to do so. *See* 26 A.L.R. 4th 102, "Communication with Party Represented by Counsel as Ground for Disciplining Attorney." Likewise, unless the attorney has the consent of the represented party's attorney or unless the attorney is authorized by law to do so, an attorney may not inquire directly of the opposing party about whether a settlement offer has been received, even if the attorney reasonably believes the opposing party's attorney has not relayed the offer to his client. *See* ABA Formal Op. 92-362 (July 6, 1999).

10. Rule 4.2(d)(1), *Limitations on Communications*, provides: "When communicating with a represented person pursuant to this Rule, no lawyer may (1) inquire about information regarding litigation strategy or legal arguments of counsel, or seek to induce the person to forego representation or disregard the advice of the person's counsel" This rule applies only when a lawyer is communicating with a represented person, as authorized by Rule 4.2, outside the presence of the represented person's lawyer; for example, when the represented person's lawyer has consented to the communication. Accordingly, a letter containing a settlement offer that is delivered directly to Defendant in violation of Rule 4.2(a) is not subject to Rule 4.2(d)(1). Furthermore, a letter containing a settlement offer written to Defendant or to Defendant in care of his lawyer that is not delivered to Defendant does not violate Rule 4.2(d)(1), regardless of its content, as there is no *ex parte* communication with a person represented by counsel

in such cases. However, delivery to Defendant's lawyer of a settlement offer written to Defendant or to Defendant in care of his lawyer with contents violative of Rule 4.2(d)(1) may constitute professional misconduct in violation of Rule 8.4(a), even if the letter is not delivered to Defendant. Rule 8.4(a) provides that it is professional misconduct for a lawyer to attempt to violate the Rules of Professional Conduct. Whether a settlement offer written to Defendant or to Defendant in care of his lawyer with contents violative of Rule 4.2(d)(1) which is not delivered to Defendant is an attempt to violate Rule 4.2(d)(1) will depend on a fact-intensive inquiry as to whether there is an intention that the offer be delivered to Defendant.

11. Defendant's lawyer is not obligated in such cases to deliver the written offer to Defendant. Defendant's lawyer's obligation to keep Defendant reasonably informed about the status of the matter is satisfied by communicating to Defendant the substance of the offer of settlement. *See* Comment to Rule 1.4 ("A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a pro-offered plea bargain in a criminal case shall promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable.")

12. For the reasons explained in note 10, *supra*, even if the Defendant's lawyer does not deliver the written offer to Defendant, the offer may constitute a violation of Rule 4.2(d)(1), depending upon an analysis of the content of the offer and the facts and circumstances of its delivery to Defendant's lawyer.

13. Utah Ethics Advisory Op. 98-07, 1998 WL 493028 (Utah St. Bar).

14. Unless it is otherwise permitted.

Rules Cited:

4.14.2