Utah Ethics Opinions

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UTAH STATE BAR

Ethics Advisory Opinion Committee

Opinion No. 04-01

Issued March 29, 2004

¶1 **Issue:** What action, if any, may a lawyer for an employer ethically undertake on behalf of a vanished former employee who, along with the employer, has been named as a defendant in an action arising when the person was an employee?

¶2 **Answer:** Under certain narrowly prescribed conditions, an employer's lawyer may ethically take limited action to protect the interests of the vanished former employee, provided the lack of direct contact with that defendant is brought to the attention of the relevant tribunal.

¶3 **Facts:** Plaintiff filed suit naming a company and its former employee as defendants. The employer concedes that the former employee was acting in the course and scope of his employment and has asked the company's lawyers to represent the missing defendant. Absence of a formal answer to the complaint may result in a default judgment being entered against the absent former employee. We have no information about the reasons for the employee's absence, but we assume that a reasonable effort has been made to locate the person and determine the reason for the absence. We also assume that, at this early stage of the proceeding, the interests of the employer and former employee are not in conflict.**1**The lawyer requesting this opinion also indicated that the employer has liability insurance that covers the incident giving rise to the lawsuit.**2**The company has requested that the lawyer represent the missing ex-employee.

¶4 **Analysis:** This case presents two fundamental, but competing ethical principles: On the one hand, a basic ingredient of the representation of a client is that, under Rule 1.4, the lawyer communicate with the client, keep the client informed about the status of the case, and provide sufficient information to the client that he may make informed decision.**3**On the other hand, lawyers have a general obligation to advance the administration of justice.**4**

¶5 A formal application of Rule 1.4, without reference to any other parts of the Rules of Professional Conduct, would produce the following syllogism: The lawyer hasn't communicated with the absent ex-employee and cannot formally satisfy the requirements of Rule 1.4; a violation of Rule 1.4 constitutes an ethical transgression; ergo, the lawyer may not ethically represent the ex-employee. Yet, we find this result inconsistent with the greater public policy of providing safeguards for an individual's rights to the extent practicable and when it can be done without infringing on the rights of others. After all, the Utah Rules of Professional Conduct are "rules of reason . . . [that] should be interpreted with reference to the purpose of legal representation."**5**

¶6 Further, before a mechanical application of Rule 1.4 to the absent defendant leads us to conclude that lack of initial attorney-client communication mandates no representation, we consider the intent of Rule 1.4. It is constructed around the normal relationship of an attorney-client contact already having been established and provides the guidelines that require a lawyer to keep that client properly informed "to the extent the client is willing and able" to be so informed.**6**Here, for reasons that are not known—and perhaps not contemplated by the drafters and adopters of the Rules—the (prospective) client is not "willing and able." Without further analysis, we, therefore, decline to conclude that Rule 1.4 prevents all forms of representation of the missing employee.

¶7 Cases and opinions that address this exact issue are difficult to find. There are many that address circumstances where an attorney-client relationship had already been formed and the client subsequently disappears. Many of these conclude that the mere absence of an established client does not completely preclude the attorney from taking some action on behalf of the missing client. For example, a lawyer has a general obligation to preserve a client's assets that may be in the lawyer's possession when the client disappears and to make reasonable attempts to locate the client,**7**and there are numerous opinions that find it ethical to file pleadings on behalf of a missing existing client to toll a statute of limitations.**8**In general, an attorney may not simply walk away from a case if an existing client cannot be immediately located.

¶8 In a short memorandum decision in 1981 dealing with a related issue, the Appellate Division of the New York Superior Court concluded that it was premature for a trial court to strike an answer filed on behalf of a defendant who could not be located: "We do not think that the real party in interest (presumably the insurance company) should be precluded from defending the action if the client cannot be located."**9**

Although the matter could not proceed too far without the appearance of the missing defendant, the Appellate Division required that the answer filed on behalf of the missing defendant be reinstated.

¶9 Although the absence of the person makes it impossible to form a classic attorney-client relationship, we believe invoking Rule 1.4 to prohibit all representation elevates form over substance. The better approach to this issue is to ask whether there is a domain of activity in which the lawyer may participate to provide some measure of protection to the absentee's interests without running roughshod over rules such as Rules 1.4 and 2.1.**10**We conclude that there is such a domain, the breadth of which will be dictated by the particular facts of the situation.**11**

¶10 More fundamental than whether Rule 1.4 would be formally complied with is the question of whose interests would be harmed or compromised by a lawyer's limited representation of an absentee's interests. Under the facts presented to us, we do not see any material harm to any party or any reason that the employer's lawyer should be prohibited from performing a minimal role in protecting the absentee from a possibly devastating default judgment. For example, it may be appropriate to file an answer to the complaint that is supported by the facts as best the lawyer can determine them from the employer and other reasonably available sources.**12**

¶11 Rule 1.14 also provides guidance in our analysis. Although Rule 1.14 does not apply directly to the absentee client, the situations addressed by that rule are quite analogous. "When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."**13**Admittedly, this contemplates the existence of an attorney-client relationship, and one of the primary arguments against permitting the lawyer to provide minimal initial representation is that there has been no communication between the lawyer and the absentee defendant. But, that is not significantly different from the "client under a disability" guidelines of Rule 1.14, where "the client's ability to make adequately considered decisions in connection with the representation is impaired." Here, it is "impaired" because the defendant cannot be found.

¶12 This is not to suggest that the representation of those interests is or should be open-ended. The lawyer must contemporaneously take steps necessary to bring the situation to the attention of the tribunal before which the action is pending. This could take the form of a motion to withdraw once an answer has been filed, **14**an immediate request for the appointment of a guardian ad litem, **15**or other explanatory filing.

¶13 Under these circumstances, we conclude that a lawyer may, consistent with the Utah Rules of Professional Conduct, undertake a brief transitional representation in order to put the matter before a judicial officer. This, it seems to us, provides a proper balance between a minimal safeguard for an absent defendant until a judicial officer can consider the situation and decide, as a matter of law, the appropriate disposition.

¶14 We also observe that the foregoing does not impose an obligation on the lawyer to represent the employer or employee. Nothing in our analysis requires the lawyer to undertake the representation. As the facts were put before us, the employer has asked a lawyer to represent the absent ex-employee—at least for limited purposes of preserving the defendant's position until a judge can sort the matter out. The lawyer has no ethical duty to undertake the representation, however.**16**

¶15 Finally, although the factual situation that led to this request for an opinion arose in the context of an incident for which there is liability insurance, the presence or not of insurance coverage does not affect our analysis. We do note, to the extent that the insurer has provided or designated counsel for the employer and ex-employee, the lawyer must exercise his independent judgment with respect to any representation of the defendants. In particular, any contractual constraints between the insurer and the employer that might limit the attorney's scope of representation may not apply to the representation the lawyer may undertake on behalf of the absent defendant.**17**

¶16 **Conclusion:** Under certain narrowly prescribed conditions, an employer's lawyer may ethically take limited action on behalf of a vanished former employee who is a co-defendant with the employer, provided the lack of direct contact with that defendant is brought to the attention of the relevant tribunal.**18**

Ten of the Committee's 13 voting Members concur with the foregoing Majority Opinion.

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Three Members of the Committee respectfully dissent:

¶17 We believe the representation described in the factual scenario in the majority opinion violates Rules 1.2, 1.4 and 3.2 of the Utah Rules of Professional Conduct and may also violate Rule 3.1 in some situations.

¶18 Rule 1.2 requires the attorney to abide by the client's decisions regarding the litigation. Since the former employee and the attorney have not communicated, the attorney cannot determine what objectives the former employee may have in the litigation nor can the attorney form any opinion as to what decisions the former employee might make.**19**

¶19 Rule 1.4 requires the attorney to maintain reasonable communication with the client. In situations in which the attorney has had no contact whatsoever with the client, the "reasonable" communication element cannot be satisfied.

¶20 Rule 3.1 requires the attorney to make only meritorious claims and contentions. The majority suggests that the attorney can satisfy this rule when filing an answer by discussing this matter with the employer. While this may sometimes be true, it will not always be true. Often times, the employer may not have taken a detailed statement from the employee regarding the facts of the incident and other employees may not have sufficient knowledge of the facts to allow the attorney to determine whether the defenses asserted are meritorious. Further, the employer may often lack sufficient information to allow the attorney to adequately determine whether to plead affirmative defenses, and if so, which affirmative defenses to plead.

¶21 The majority suggests that a "formal" or "mechanical" reading of Rule 1.4 could lead to the conclusion that the attorney may not undertake a representation of the client. The majority then considers public policy and argues that "[m]ore fundamental than whether Rule 1.4 would be formally complied with is the question of whose interests would be harmed or compromised by a lawyer's limited representation of an absentee's interests."

¶22 The facts of this case do not justify the decision of the majority. The majority articulates one public-policy concern in this matter as the potential for "a possibly devastating default judgment." The Rules of Civil Procedure and existing case law contain adequate safeguards to protect the former employee from a wrongful default judgment. The majority is also presumably concerned that the employer may be bound by the default judgment. While that issue has not been decided by the Utah courts, the majority of states would not bind the employer to the admissions made by the employee in the default judgment.**20**Because the employer is not bound by the default judgment, no public policy concerns are implicated. Even if Utah does adopt the minority position and holds that the employer is bound by the default of the employee, that possibility is not a sufficient reason to read the Rules of Professional Conduct differently.

¶23 The majority also does not see that "material" harm will come to anyone if the lawyer undertakes the representation. While that may be true in some cases, some people will likely be harmed in other cases. In many cases, the resolution of the lawsuit may be delayed, thereby harming the plaintiff by delaying the collection of damages, during which time the assets may be squandered or lost. Other instances of harm to the plaintiff may occur as well.**21**

¶24 The majority properly states that when an attorney has previously undertaken a representation and the client disappears, the attorney must continue making reasonable efforts to protect the client's interests, in accordance with the instructions given to the lawyer prior to the disappearance of the client. The majority also properly states that when a person obtains insurance coverage that requires the insurance company to defend the person, the attorney may undertake to defend the person without communicating with the person, in those rare cases where the attorney attempts to communicate with the person but is unable to do so. In that situation, the insured's consent to the representation is presumed to have occurred when the insured obtained the insurance coverage.

¶25 Further, the insurance contract gives the attorney some indication of the direction the client would wish to proceed in the lawsuit. The insurance and former client situation are completely different from the factual scenario presented. Under the facts presented, the attorney has no basis to infer that the employee consented, or even would consent, to the representation. In addition, the attorney has little or no objective evidence as to the direction the former employee would like to pursue in the lawsuit. Finally, the attorney has had no communication with the former employee and will often times have no communication after the representation is undertaken.

¶26 If the employer, or another interested person, has reason to believe that the former employee would act but is unable to do so for some reason, Rule 1.14 allows the attorney to seek the appointment of a guardian ad litem. If a guardian ad litem is appointed, the attorney may act in accordance with the instructions received from the guardian ad litem.

¶27 Absent the former employee's agreement to the representation—either express or implied through an insurance agreement or the appointment of a guardian ad litem, the lawyer is prohibited by the Rules of Professional Conduct from representing the former employee. Because the lawyer is prohibited from undertaking a representation, the lawyer may not take any action on behalf of the employee, including the filing of an answer or a motion for an extension of time.

Footnotes

1. For example, we assume that neither the employer nor employee are likely to have and pursue a claim against the other. *See* Utah Rules of Professional Conduct 1.13(e).

2. It may also be that the employer's defense lawyer has been retained by the insurance carrier. However, this factor does not play a role in our analysis. *See generally* Utah Ethics Advisory Op. 02-03 (Utah St. Bar 2002). Utah Ethics Advisory Opinions are available at www.utahbar.org under "Rules, Policies and Opinions."

3. Communication.

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to enable the client to make informed decisions regarding the representation.

Utah Rules of Professional Conduct 1.4.

4. For example, "The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law." Utah Rules of Professional Conduct, Scope 2. Similarly, Rule 8.4(d) implies a lawyer's duty to act in a manner that will serve the administration of justice: "It is professional misconduct for a lawyer to . . . [e]ngage in conduct that is prejudicial to the administration of justice."

5. Utah Rules of Professional Conduct, Scope 1.

6."The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, *to the extent the client is willing and able to do so.*" Utah Rules of Professional Conduct 1.4, cmt. 1 (emphasis added).

7. *See, e.g.*, Fla. Comm. on Professional Ethics Op. 77-2, 1977 WL 23165 (Fla. St. Bar Ass'n).

8. *See, e.g.*, Philadelphia Bar Op. 98-8; So. Car. Bar Op. 98-07; So. Dak. Bar Op. 92-6.

9. *Heyward v. Benyarko*, 440 N.Y.S.2d 21 (N.Y. App. Div. 1981) (parenthetical in original).

10."A lawyer shall abide by a client's decisions . . . ." Utah Rules of Professional Conduct 2.1.

11. We also note that, under Rule 1.2(a), the company client will determine the scope and objectives of its representation, within appropriate boundaries. Thus, to the extent not otherwise ethically or legally barred, the lawyer's pursuit of representing the missing individual in this fact pattern is consistent with the requirements of Rule 1.2.

12. We believe a lawyer can do this at an early stage of a proceeding and not run afoul of Rule 3.1, which prohibits frivolous claims and those not brought in good faith. Nevertheless, the lawyer must be vigilant not to be unduly influenced by his other client (or its insurer).

13. Utah Rules of Professional Conduct 1.14(a).

14. *See id.* Rule 1.16(b)(6).

15. *Id.* Rule 1.14(b): "A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."

16. To the extent provided by this Opinion, the employer's lawyer may have a responsibility to undertake the limited representation of the former employee in order to protect the employer's interests adequately. For example, a default judgment against the former employee might ultimately harm the employer. *See* Utah Rules of Professional Conduct 1.3, & cmt.

17. *See id.* Rule 5.4(c); *see also* Utah Ethics Advisory Op. 02-03 (Utah St. Bar).

18. Portions of the Dissent appear to assume that we have approved an extended period of representation. To the contrary, we only approve a brief "license" to provide representation sufficient to bring the matter before an appropriate judicial officer.

19. Although it might be presumed that the former employee does not want a default judgment entered, this is not always the case. Occasionally, people decide not to defend lawsuits. If the former employee had decided not to defend the lawsuit, the attorney would not be abiding by those wishes. It is even possible to imagine cases where an employee, if asked, would want a judgment taken to protest or highlight an employer's alleged misconduct, just as civilly disobedient protesters might actually want to be arrested. Further, in cases in which the former employee has decided to take a course of action contrary to that of the employer, the attorney will be forced to evaluate the instructions he receives from the employer in light of that possibility. If this practice becomes widespread, instances will surely arise in which the employer leads the attorney to act in contravention to the employee's wishes.

20. *See* 46 AM. JUR. 2d *Judgments* § 282 (19__). *See also Brazos Valley Community Action Agency v. Robison*, 900 S.W.2d 843 (Tex. App. 1995) (employee's default could not

be binding on employer; the appellate court also noting that the employer did not have authority to answer on behalf of the employee.); *Gearhart v. Pierce Enterprises, Inc.*, 779 P.2d 93 (Nev. 1999) (suit against a principal and a surety; default judgment against the principal was not binding on the surety.)

21. If this practice becomes common on the part of employers and their counsel, numerous fact situations will arise in which persons will be harmed. For example, if the former employee hires her own attorney and files an answer simultaneously, the answers may be inconsistent. The attorney for the employer will be forced to move to withdraw the answer that was filed without the employee's permission. In cases in which the lawyer for the employer discovers that the former employee and the employer are adverse or wish to pursue different courses during the litigation, the lawyer may be forced to withdraw as lawyer for both the former employee and the employer, thereby depriving the employer of its choice of counsel.