Utah Ethics Opinions

2005.

05-01. UTAH STATE BAR ETHICS ADVISORY OPINION COMMITTEE

Opinion No. 05-01

Issued April 28, 2005

1 **Issue:** A former client of an attorney moved the trial court to set aside the former client's previous guilty plea on the basis that the attorney's prior advice on accepting the prosecution's plea offer had "confused" him. May the attorney testify concerning the previous discussions with the former client to prevent a possible fraud upon the court or to protect the attorney's good name and reputation?

2 **Opinion:** Absent a court order requiring the attorney's testimony, and notwithstanding a subpoena served on the attorney by the prosecution, the attorney may not divulge any attorney-client information, either to the prosecution or in open court.

3 **Facts:** The client hired the attorney (the "reviewing attorney") for the limited purpose of reviewing and advising about a plea offer made by the prosecution to the client in a matter where the client had been charged with a first-degree felony. The client had retained another attorney to represent him at trial ("trial attorney") for the purpose of entering a guilty plea. The client subsequently moved to set aside the plea of guilty, asserting that he had become "confused" in his discussions with the reviewing attorney, and that the confusion resulted in an improvident entry of a plea of guilty.

4 The prosecution subpoenaed the reviewing attorney to testify regarding the issue of the scope and substance of the attorney's representation. The reviewing attorney desires to testify, believing that the client may commit a fraud upon the court by misrepresenting their relationship and the advice given. The attorney also wishes to defend and maintain her good name and reputation if the matter is to be heard in open court. The former client has refused to waive his attorney-client privilege, indicating he intends to assert the privilege fully to bar the attorney's testimony.

5 May the attorney testify regarding matters within the scope or substance of the attorney's representation? May the attorney discuss the nature of anticipated testimony out of court with the prosecutor?

6 **Analysis:** The reviewing attorney's inquiry presents two issues. The first relates to the subject of testimony in a judicial setting and involves the attorney-client privilege under Rule 504(b) of the Utah Rules of Evidence. 1 The question of what an attorney may testify to, or be compelled to testify to, in obedience to a court order is established by an exception to the privilege, either as stated in the evidentiary rules or by judicial precedent. When a former client objects in a judicial proceeding to disclosure of privileged material or information, the decision regarding what the attorney may reveal is one for the court.

7 The second issue relates to the attorney's ethical requirement of client confidentiality pursuant to the Utah Rules of Professional Conduct, which is a separate and independent obligation. The attorney's obligation of client confidentiality pursuant to Utah Rule of Professional Conduct 1.6 and loyalty to a former client pursuant to Rule 1.9 must be considered by the attorney in the determination of whether any disclosures may be made to the prosecution during trial preparation. Although there are some similarities between the two principles, they are not the same and should not be confused. 2

8 We have previously made clear that the attorney-client relationship is established when a party seeks and receives the advice of an attorney, regardless of the brevity of the conversation, whether a fee was charged or a contract of employment executed between them, or whether the conversation was in person or by telephone. The fact that advice and assistance are sought and the attorney agrees to represent the client fully suffices to establish the relationship. 3

9 We have also previously dealt with the somewhat related question of the ethical obligations of an attorney who, without prior warning, hears his client commit perjury or otherwise materially mislead a tribunal. 4 However, we have not addressed the ongoing obligation of an attorney to maintain client confidences after the attorney-client relationship has come to an end in a situation like the one before us.

10 In this case, there is no question that there was an attorney-client relationship, albeit brief and limited in scope; that advice was sought with respect to the subject of entry of a plea of guilty to a serious felony charge; and that advice was given. However limited the representation, the prosecution has now subpoenaed the attorney, intending to elicit testimony with respect to the scope of the representation agreement and to probe the details of the discussions between attorney and client.

11 We examine the two interrelated, but separate and independent, principles relating to the protections of

confidences, documents and other such things growing out of the attorney-client relationship: the privilege undergirded by evidentiary rules and substantive case law; and the principle of confidentiality, primarily as stated in Rule 1.6 of the Utah Rules of Professional Conduct.

12 *The Evidentiary Rule of Privilege.* It would be inappropriate for the Committee to opine about the issues to the extent the attorney's request calls for a legal opinion and interpretation of law. 5 Because the evidentiary considerations are intertwined with the ethical rule, however, some recitation of established law as it relates to confidentiality is appropriate.

13 The evidentiary rule governing the lawyer-client privilege is Utah Rule of Evidence 504, subject to enumerated exceptions listed there and in Rule 507. Rule 504(b) states:

(b) *General rule of privilege.* A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client between the client and the client's representatives, lawyers, lawyer's representatives, and lawyers representing others in matters of common interest, and among the client's representatives, lawyers, lawyer's representatives, and lawyers representing others in matters of common interest, in any combination.

Rule 504(d) enunciates five general exceptions to the privilege:

(d) *Exceptions.* No privilege exists under this rule [504]:

1) *Furtherance of crime or fraud.* If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or

(2) *Claimants through same deceased client.* As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or

(3) *Breach of duty by lawyer or client.* As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer; or

(4) *Document attested by lawyer.* As to a communication relevant to an issue concerning a document to which the lawyer is an attesting witness; or

(5) *Joint clients.* As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

The focus of the exceptions, as with the statement of the privilege in Rule 504(b) itself, is on the evidentiary aspects of litigation, rather than in providing ethical guidance to the attorney.

14 Rule 507(a) of the Utah Rules of Evidence contains a further exception:

A person upon whom these rules confer privilege against disclosure of the confidential matter or communication waives the privilege if a person or a predecessor while holding the privilege voluntarily discloses or consents to the disclosure of any significant part of the matter or communication or fails to take reasonable precautions against inadvertent disclosure. This Rule does not apply if the disclosure is itself a privileged communication.

15 There is a direct constraint upon the attorney within the formulation of the privilege embodied in Rule 504(b). The right belongs to the client, and it is the client's alone to waive. No examination of the attorney regarding the relationship may take place without client consent or waiver or a court order overruling the client's objection. 6

16 The Utah Supreme Court has discussed the nature and basis of the Rule 504 privilege and its exceptions, identifying an additional exception of judicial origin: A party may waive the privilege by placing the attorney-client communication at the heart of a case - e.g., by asserting good-faith reliance on the advice of counsel. 7 This speaks to at least one of the essential considerations of the question before us.

17 How courts might best deal with the privilege issue, once raised by the client or the attorney seeking protection of the privilege, has been addressed at length by the United States Supreme Court, 8 and the extent to which the issue is intertwined with the ethical considerations has also been noted by at least one court in Utah. 9

18 *The Ethical Rule of Confidentiality.* Utah Rule of Professional Conduct 1.6, Confidentiality of Information, governs a lawyer's ethical obligation to maintain inviolate the information received and advice given during the course of the attorney-client relationship: 10

(a) A lawyer shall not reveal information relating to representation of a client except as stated in paragraph (b), unless the client consents after consultation.

(b) A lawyer may reveal such information to the extent the lawyer believes necessary:

(1) To prevent the client from committing a criminal or

fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm, or substantial injury to the financial interest or property of another;

(2) To rectify the consequences of the client's criminal or fraudulent act in the commission of which the lawyer's services had been used;

(3) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client or to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or

(4) To comply with the Rules of Professional Conduct or other law.

These exceptions are entirely permissive. None establish a duty requiring disclosure, although circumstances may well require in-court disclosure pursuant to the obligations of Utah Rule of Professional Conduct 3.3, Candor Toward the Tribunal. 11

19 In discerning the fundamental distinction to be drawn in Utah between the privilege established by law and the principle of confidentiality entrenched in the rules of ethics, we turn to the comment to Utah Rule of Professional Conduct 1.6, which states, in pertinent part:

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

(Emphasis added.)

20 The Rule 1.6 comment draws the distinction between the attorney-client privilege afforded in judicial and other proceedings and the rule of confidentiality established by ethical rule, and this is of particular importance in resolving the issue before the Committee. Here, the reviewing attorney has been subpoenaed and presumably will be questioned and requested, or compelled, to testify. This takes the question out of those situations to which Rule 1.6 is addressed.

21 *The Case Before Us.* This distinction highlights the necessity of responding to the issue not explicitly addressed by the reviewing attorney, but which is inherent in the inquiry. The request covers a broader issue than seems to be answered by reported cases. In fact, the request mirrors what may, in practice, occur more frequently than the case law might suggest. The appellate decisions generally address circumstances where either client or the client's present or former lawyer is attempting to enforce the privilege against the claim of exception by a third party. 12

22 The twist in this case is the affirmative desire of the reviewing attorney to be allowed to speak freely regarding otherwise confidential or privileged communications. The determination of whether an attorney will be compelled to testify over the client's assertion of the privilege normally would be made by the trial judge, and if the court rules that the privilege is abrogated, the attorney must testify. Although undoubtedly quite rare, an attorney may occasionally have to make a decision whether to risk contempt pending appeal in order to protect the attorney-client relationship or comply with the court's order. 13

23 In contrast, in this case the reviewing attorney wishes to cooperate with the prosecution. The threshold question therefore becomes: What may the reviewing attorney disclose to the prosecutor before the trial court rules on whether the attorney may be compelled to testify? There is no attorney-client privilege between counsel for the government and a potential witness that might protect such a discussion any more than exists between a third party's lawyer and any witness who happens to be an attorney.

24 Indeed, the attorney should be cautious in her relationship with the prosecutor. Under the request before us, there is no reason to suspect abuse or that the prosecution might subpoena an attorney-witness for an improper purpose or to drive a wedge between the client and the attorney. Nonetheless, the attorney should not be too eager to find circumstances providing justification for disclosing confidential information. 14

25 Utah Rule of Professional Conduct 1.9 prohibits attorneys from using "information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client." A desire to protect one's good name is not among the authorized exceptions to the rule. The reported cases are replete with examples of circumstances that may tempt the reviewing attorney to testify in contravention of the privilege, particularly where the crime-fraud exception is invoked. 15 Whether rightly or wrongly, in some cases an attorney may feel that the only alternative to becoming a target of the investigation is to be cooperative with the prosecution. In such a case, the attorney may be tempted to

reveal privileged communications in order to avoid that possibility. 16 As this request illustrates, there is also a very real possibility for conflict, where the attorney wishes to defend a good reputation with the prosecutor and the trial judge. Nevertheless, it is the attorney's obligation to uphold the privilege and, if anything, to err on the side of refusing to disclose attorney-client communications in any but a clear and convincing case.

26 The facts presented by the requesting attorney do not fit within any of the exceptions provided by Rule 1.6(b), and reliance on any of the Rule 1.6(b) exceptions would, in our opinion, be misplaced.

27 Exception 1.6(b)(1) allows permissive disclosure "[t]o prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm, or substantial injury to the financial interest or property of another." This exception is inapplicable because the former client is not attempting to commit a criminal or fraudulent act the lawyer believes is likely to result in death or to inflict substantial bodily injury or substantial injury to the financial interest or property of another.

28 The attorney could take the position that substantial injury to the attorney's own financial interests may occur if word of the client's defamatory testimony reaches the street. However, such a prospect is far too speculative to invoke this provision. 17 In addition, court proceedings, pleadings and testimony are protected with absolute privilege. Nor would the State of Utah or the judiciary itself suffer any but the most attenuated injury. There are no other potential victims. Accordingly, Rule 1.6(b)(1) does not permit disclosure.

29 Rule 1.6(b)(2) sets forth the classic crime-fraud exception: "To rectify the consequences of the client's criminal or fraudulent act in the commission of which the lawyer's services had been used." It does not apply to this case because the former client has not utilized services of the lawyer to complete a criminal or fraudulent act, nor is he now acting on advice the lawyer gave in aid of the commission of a fraudulent act, which would free the lawyer to "rectify the consequences." The mere fact that the client maintains he was confused because of the existence of the former attorney-client relationship or merely being given advice falls far short of using a lawyer's services or advice in the commission of a fraud or crime. 18 The lawyer is better advised to await or, if the situation warrants, affirmatively seek directly or on motion of the prosecution, a court order allowing extra-judicial disclosure.

30 Exception 1.6(b)(3) allows disclosure "[t]o establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client or to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved." While an arguable case might be made for disclosure under this exception, it too is fraught with problems. The primary problem is that the "controversy" is not between lawyer and client, except quite tangentially. While there may well be a dispute over the facts between lawyer and client, there is no "controversy" between them in the sense contemplated by the rule. Nor is there a criminal or civil action against the lawyer. 19

31 Finally, there does not appear to be any other Rule of Professional Conduct or case law that would allow disclosure under Rule 1.6(b)(4) "to comply with the Rules of Professional Conduct or other law." However, should the court issue an order permitting any such disclosures, either *sua sponte* or in response to a motion from the reviewing attorney or the prosecutor, this would constitute "other law" under Rule 1.6(b)(4) and would permit the lawyer to disclose prior attorney-client communications in strict compliance with such an order.

32 **Conclusion:** As a matter of professional ethics under the Utah Rules of Professional Conduct, in the absence of a court order to the contrary, the reviewing lawyer may not divulge any aspect of the communications with the former client.

Footnotes

1. Utah Rule of Evidence 504 supersedes the statutory privilege set forth in Utah Code Ann. § 78-24-8. *Spratley v. State Farm Mut. Automotive Ins. Co.*, 78 P.3d 603, 612 n.3 (Utah 2003).

2. "The ethical rule of confidentiality is distinct from the evidentiary rule of attorney-client privilege. The scope of the attorney-client privilege is much more limited than that of the confidentiality rule." ABA/BNA Lawyers' Manual on Professional Conduct 55:102 (1993).

3. Utah Ethics Advisory Op. 97-02, 1997 WL 45141 (Utah St. Bar).

4. Utah Ethics Advisory Op. 00-06, 2000 WL 1523292 (Utah St. Bar).

5. "Committee opinions shall interpret the Rules of Professional Conduct adopted by the Utah Supreme Court but, except as necessary to the opinion, shall not interpret other law." Rules of Procedure, Ethics Advisory Opinion Comm. § 1(b). The following requests are outside the Committee's authority: . . . [r]equests for legal, rather than ethics opinions." *Id.*§ I(b)(2)(iii).

6. *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).

7. *Doe v. Maret*, 984 P.2d 980 (Utah 1999).

8. *United States v. Zolin*, 491 U.S. 554 (1989).

9. Although the case centers more on issues of conflict than confidentiality, *Bullock v. Carver*, 910 F. Supp. 551, 557 (D. Utah 1995) (Boyce, Mag. J.), points with approval to a client's former counsel's action in responding to a subpoena in a *habeas corpus* petition:

> The evidence presented shows that [counsel] has conducted herself in this matter with utmost sensitivity to her former role as co-counsel for petitioner. She has consulted with the Utah State Bar on several occasions in order to receive direction as to her ethical responsibilities. She has been particularly sensitive to her potential conflicts and sought to remove herself from these conflicts from the time of entering the Utah Attorney General's office up to the present time. She has refused to discuss her representation of Bullock or any confidences and only spoke to Bullock's counsel and respondent's counsel about this case after this court entered its order authorizing her to discuss the case.

(Emphasis added.)

10. ABA Model Rule 1.6 differs somewhat from the current Utah Rule 1.6. However, the differences do not affect our analysis or conclusion in this case.

11. Utah Ethics Advisory Opinion 00-06, 2000 WL 1523292 (Utah St. Bar).

12. *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888); *Doe v. Maret*, 984 P.2d 980 (Utah 1999); *United States v. Zolin*, 491 U.S. 554 (1989); *In Re Grand Jury Subpoenas v. United States*, 144 F. 3d 653 (10th Cir. 1998).

13. *See, e.g., In Re Grand Jury Proceedings*, 857 F.2d 710 (10th Cir. 1988); *In re Vargas*, 723 F.2d 1461 (10th Cir. 1983).

14. A statement of the rule and a prudent course of action, although grounded in a different set of requirements from those prevailing in Utah is set forth in *United States v. Edgar*, 82 F.3d 499, 508 (1st Cir. 1996):

> The first line of defense to protect Edgar's privilege lay in the hands of his lawyer. A lawyer has an obligation not to reveal client confidences. . . . A lawyer also has an obligation to assert privilege on behalf of a client. . . . Generally, an attorney has an obligation to assert the privilege on behalf of the client and not to disclose confidential information until there is a judicial determination that there is no privilege. . . . Even if there is an assertion that there is no privilege because the crime-fraud exception applies, the attorney is required to give notice to the client. . . . If the attorney violates these duties, he is at risk at least of a malpractice suit and of professional discipline.

(Citations omitted.)

15. In *Clark v. United States*, 289 U.S. 1 (1933), Justice Cardozo first recognized the crime-fraud exception to the rule of privilege.

16. *See United States v. Edgar*, at 507-08.

17. Absolute immunity is afforded to the testimony of witnesses, whether testifying voluntarily or under compulsion. "The resulting lack of any really effective civil remedy against perjurers is simply part of the price that is paid for witnesses who are free from intimidation by the possibility of civil liability for what they say." W. PAGE KEETON & WILLIAM L. PROSSER, PROSSER AND KEETON ON TORTS § 114 (5th ed. 1984); *Krouse v. Bower*, 2001 UT 28, 20 P.3d 895, 898.

18. The circumstances undoubtedly contemplated by this exception to the rule were dealt with in ABA Formal Op. 92-366, ABA/BNA Lawyers' Manual on Professional Conduct 1001:134 (1992). where the lawyer acting for a client in negotiating a loan unknowingly used fraudulent audited financial statements and fraudulent auditor opinion letters supplied by the client to obtain a loan. The ABA opinion stated that under those circumstances, "A lawyer who knows or with reason believes her services or work product are being used or are intended to be used by a client to perpetrate a fraud must withdraw from further representation of the client, and may disaffirm documents prepared in the course of the preparation that are being, or will be, used in furtherance of the fraud, even though such a 'noisy' withdrawal may have the collateral effect of inferentially revealing client confidences."

19. For a discussion of the role of Rule 1.6(b)(3) within the framework of an attorney's response in a claim or controversy, *see Spratley*, 79 P.3d at 608-09.