Utah Ethics Opinions

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05-04. UTAH STATE BAR ETHICS ADVISORY OPINION COMMITTEE

Opinion No. 05-04

Issued September 8, 2005

1 Issue: What are the responsibilities of an attorney to a person the attorney has interviewed as a prospective client after it has been determined that the attorney will not undertake the representation?

2 Opinion: In most circumstances, the obligation of confidentiality attaches when a prospective client consults with the attorney in contemplation of retaining the attorney, even if that attorney is not ultimately retained and never advises the client. The provisions of Rules 1.6 and 1.9 regarding former clients outline the attorney's responsibilities and the circumstances when such an attorney may breach confidentiality.1 Absent consent, the attorney may not undertake representation of another party in the same or substantially factually related matter if the attorney acquired relevant confidential information from the prospective client. An attorney may avoid disqualification by strictly limiting the information acquired during the initial consultation or by explicit agreement and waiver prior to the initial consultation. Under the Utah Rules of Professional Conduct in effect on the date of issuance of this Opinion, if the attorney is disqualified, the entire firm of that attorney is also disqualified.

3 Facts: We consider three sequential questions:

(a) A prospective client meets with an attorney in anticipation of retaining counsel and discusses certain facts with that attorney. The client does not retain the attorney. What, if anything, may the attorney say about the consultation?

(b) Thereafter, the prospective client retains other counsel who files court papers in the matter. The original attorney notices that certain facts pled in the court papers are inconsistent with the facts the prospective client originally reported to that attorney. May the initial attorney reveal this discrepancy?

(c) After the prospective client retains other counsel, an opposing party seeks to retain the attorney who did the initial interview with the prospective client. May the attorney or others in the attorney's firm represent an opposing party in the matter?

4 Analysis: These questions require a multi-step analysis. First, we must determine if, due to the initial interview, an attorney-client relationship existed such that the obligation of confidentiality attached. Second, if such an attorney-client relationship with obligations of confidentiality did develop, we must consider whether there are exceptions to confidentiality that would permit counsel to breach confidentiality or reveal information about such a former prospective client. Third we discuss whether an attorney-client relationship may attach for some purposes (e.g., obligation of confidentiality) and not for others (e.g., conflicts of interest). We outline when the interview of a prospective client will prevent the attorney (and the attorney's firm) from representing another party in the same or a substantially related matter.

Formation of Attorney-Client Relationship for Obligation of Confidentiality

5 Previously, we considered a case regarding an attorney holding a telephone conference with a potential client who was a fugitive from justice. The police asked the attorney to disclose the whereabouts of the client. The attorney refused. The Committee concluded:

[An] attorney/client relationship is established *when a party seeks and receives the advice of an attorney in matters pertinent to the lawyer's profession.* An attorney/client relationship can arise from brief informal conversations, in person or by telephone, even though no fee is ever discussed or charged and no contract of employment is signed. 2

However, Opinion 97-02 does not entirely answer the first question before us. Here, the attorney did not render any advice, but merely received information from the client in contemplation of being retained.

6 The Rules of Professional Conduct do not state when an attorney-client relationship is formed. Nor do the current Rules explicitly deal with the "prospective" client.3 Yet, in order to interpret the Rules - under either the current or proposed Rules - we must consider when the attorney's obligations to a prospective client arise. We rely upon related law, ethics opinions and informed commentary about the Rules.

7 ABA Opinion 90-358 provides the following opinion and rationale:

Information imparted to a lawyer by a would-be client seeking legal representation is protected from revelation or

use under Model Rule 1.6 even though the lawyer does not undertake representation of or perform legal work for the would-be client. . . . The legal basis for a lawyer's duty of confidentiality is derived from the law of agency and the law of evidence. See Rule 1.6 Comment.4

8 Similarly, the Restatement of the Law Governing Lawyers addresses a lawyer's duties to prospective clients and concludes that the duty of confidentiality is owed to a prospective client interviewed by the attorney:

A Lawyer's Duties to a Prospective Client

(1) When a person discusses with a lawyer the possibility of their forming a client-lawyer relationship of a matter and no such relationship ensues, the lawyer must: (a) not subsequently use or disclose confidential information learned in the consultation, except to the extent permitted with respect to confidential information of a client or former client as stated in §§ 61-67.5

9 Professor Geoffrey Hazard, Reporter for the committee that drafted the 1983 version of the ABA Model Rules of Professional Conduct, explained that the duty of confidentiality was always intended to attach at the point a potential client contacted the lawyer:

The Model Rules are limited to matters of discipline, while the Restatement must address a full range of common law doctrines, whether or not they are incorporated into a disciplinary code. . . Although the Model Rules as promulgated in 1983 did not deal explicitly with prospective clients, there was unanimous agreement that some of the basic duties owed to clients are also owed to prospective clients during the period of uncertainty. This result is easy to reconcile with the rationale and even the text of key rules regulating the client-lawyer relationship, and in 2002, a new Rule 1.18 was added to the Model Rule, making these understandings explicit.6

10 We find the standard and reasoning set forth in ABA Formal Op. 90-358, in Professor Hazard's commentary on the current Model Rules of Professional Conduct, and in the Restatement persuasive on this issue and applicable here, even without the formal adoption of Rule 1.18.

11 We further note that whether a person is a prospective client is a fact-intensive question. A friend or acquaintance may engage an attorney in informal conversation about his problems with the aim of obtaining some free legal advice, while the attorney believes she is hearing a tale of woe from a friend rather than from a "prospective client." The Restatement addresses this issue helpfully as well:

Formation of a Client-Lawyer Relationship

A relationship of client and lawyer arises when:

(1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either

(a) the lawyer manifests to the person consent to do so; or

(b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services 7

12 If there is some ambiguity in the nature of the client-attorney relationship, the law generally imposes the burden on the lawyer to "clearly and affirmatively negative the existence of the client-lawyer relationship."8

Breadth of Obligation of Confidentiality

13 Rule 1.6 prohibits the lawyer from revealing "information relating to representation of a client." As Professors Hazard and Hodes note, "This language is exceedingly broad. . . ."9 The lawyer may be required to keep even "client identity" confidential.10 This may be particularly salient regarding prospective clients who might be harmed by anyone knowing that he had consulted a particular lawyer - for example, a lawyer whose practice was limited to criminal law or to bankruptcy law.

14 Thus, "prospective clients are similar in many ways to 'actual' current clients during the period in which forming a relationship is under mutual consideration."11 Accordingly, the attorney may not reveal any information gained from the prospective client in the consultation except as would be permitted under Rule 1.6.

15 However, prospective clients "are much like 'former' clients when that period ends with a parting of the ways. . . . If no client relationship is formed, the principle of Rule 1.9 . . . prohibits adverse use of information gained during the earlier consultations with the 'almost former clients'."12 Rule 1.9 would thereafter permit the lawyer to use or reveal such information "when the information has become generally known."13

Grounds to Breach Confidentiality

16 Rule 1.6 provides that a lawyer may reveal confidential information even without the client's consent in the following circumstances:

(b) A lawyer may reveal such information [relating to the representation of the client] 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 a 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

(4) to comply with the Rules of Professional Conduct or other law.14

17 In general, the lawyer is restricted by the provisions of Rule 1.9 concerning former clients and, without the prospective client's consent, can only disclose information about the matter that is generally known or otherwise permitted under Rule 1.6(b).

18 In the second question posed, the lawyer asserts that the client has filed court pleadings that contain misstatements of fact. However, under exception (1) of Rule 1.6(b), such misstatements must constitute a crime or fraud and be "likely to result in . . . substantial injury" to another's financial interests before the attorney may breach confidentiality. If a false statement meets this standard, the lawyer may reveal confidential information to "prevent the [former] client from committing a fraudulent or criminal act." If it does not, the lawyer may not disclose the information.

19 Often the prospective client will simply communicate the nature of his case and his goals and will obtain no advice from the attorney. On some occasions, however, the attorney may point out particular problems with a proposed course of action. If the attorney does provide some advice to the prospective client and this advice is used to carry out a criminal or fraudulent enterprise, then exception (2) to Rule 1.6 would apply, permitting the first lawyer to blow the whistle on the scheming client. If no advice was given, exception (2) does not provide license for the lawyer to disclose.

20 The crime-fraud exception to attorney-client privilege would also permit the first lawyer to testify against such a prospective client. As Justice Benjamin Cardozo wrote regarding the crime-fraud exception to privilege: "A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law."15

Conflicts of Interest and Disqualification with Prospective Clients

21 The last issue is whether a conference with a prospective client would disqualify the lawyer (and the entire firm) from representing another party in the matter. This issue requires reference to Rule 1.7 for concurrent conflicts of interest, to Rule 1.9 for successive conflicts of interest, and to applicable case law.

22 A major rationale for conflict-of-interest rules is to protect confidential information and to advance loyalty to the client. However, the prospective attorney-client relationship clearly calls for less loyalty than that of actual attorney-client relationship and the necessity of disqualifying a lawyer to protect confidential information depends heavily upon the nature and amount of confidential information acquired.

23 Under applicable case law, a lawyer who interviews a prospective client will not be disqualified from representing an opposing party in the same matter if the lawyer does not learn sensitive confidential information in that first meeting. The Restatement cites the Utah federal district court case of *Poly Sofltware Int'l., Inc. v. Su* 16 for this proposition and cautions:

In order to avoid acquiring disqualifying information, a lawyer considering whether or not to undertake a new matter may limit the initial interview to such confidential information as reasonably appears necessary for that purpose. . . . The lawyer may also condition conversations with the prospective client on the person's consent to the lawyer's representation of other clients or on the prospective client's agreement than any information disclosed during the consultation is not to be treated as confidential.17

24 ABA Model Rule 1.18 adopts the provisions of the Restatement relied upon here, but, according to Hazard & Hodes, these were already implicit in the existing Model (and Utah) Rules. However, we note that proposed Rule 1.18 (and the Restatement) go a good bit further in usefully defining requirements regarding prospective clients in the area of conflicts of interest.

25 Model Rule 1.18 takes two further clarifying steps. First, subsection 1.18(c) defines what sort of information will disqualify the lawyer who interviewed the prospective client as "information that would be significantly harmful" to that person in the matter.18

26 Second, proposed Rule 1.18(d) permits the firm of the lawyer who interviewed the prospective client and received "disqualifying information" to represent another party by screening that lawyer from the new representation, provided (1) the lawyer "took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client and by providing notice to the prospective client" and (2) the former prospective client is notified. If the Utah Supreme Court adopts proposed Rule 1.18, this will permit adverse representation when the screening and notice

provisions are complied with.

27 **Conclusion**. After an attorney has interviewed a prospective client, and even though the lawyer does not undertake the representation and has not given legal advice to the prospective client, the obligation of confidentiality usually attaches. The circumstances when the attorney may breach confidentiality are governed by Rules 1.6 and 1.9 applied to former clients.

28 Absent consent, the attorney may not undertake representation of another party in the same or substantially factually related matter if the attorney acquired relevant confidential information from the prospective client. However, the lawyer may represent an opposing party in the same matter if the lawyer has not learned sensitive, confidential information in that first meeting. Under the Utah Rules of Professional Conduct in effect at the time of the issuance of this Opinion, if the attorney may not undertake the representation, the entire firm of that attorney is also disqualified.

APPENDIX

[Proposed] Utah Rules of Professional Conduct 1.18: Duties to Prospective Client (June 6, 2005)

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or;

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Footnotes

1. At the time this Opinion is being issued, the Utah Supreme Court has proposed to adopt Rule 1.18 of the ABA Model Rules of Professional Conduct, "Duties to Prospective Clients." If finally adopted, Rule 1.18 will make explicit most of the conclusion we have reached here, but will liberalize the standards governing the disqualification of law firms in certain situations by permitting screening of an individually disqualified attorney. See the Appendix to this Opinion for the full test of proposed Rule 1.18.

2. Utah Ethics Advisory Op. 97-02, 1997 WL 45141 (Utah St. Bar) (emphasis added). The opinions of the Ethics Advisory Opinion Committee can be found at http://www.utahbar.org/-rules_ops_pols/Welcome.html.

3. See note 1, *supra*.

4. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 90-358 (1990).

5. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 15(1)(a) (2000) (hereinafter "RESTATEMENT").

6. GEOFFREY C. HAZARD, JR. & W. WILLIAMS HODES, THE LAW OF LAWYERING § 2-5, at 2-7 (3d ed., 2003 Supp.)

7. RESTATEMENT § 14.

8. Hazard & Hodes § 2.5, at 2-8 (2004 Supp.).

9. *Id.* § 9.15, at 9-29 (2004-2 Supp.).

10. *Id.*§ 9.11, at 9-45 (2004-2 Supp.).

11. *Id.*§ 21A.5, at 21A-9 (2005-1 Supp.).

12. *Id.*

13. Utah Rules of Prof'l Conduct 1.9(b) (2004).

14. Utah Rules of Prof'l Conduct 1.6(b) (2004).

15. *Clark v. United States*, 289 U.S. 1, 14 (1933).

16. 880 F.Supp. 1487, 1491 (D. Utah, 1995).

17. RESTATEMENT § 15, cmt. (c).

18. [Proposed] Utah Rules of Prof'l Conduct Rule 1.18(c). See note 1, *supra*.