15-04

Opinion 15-04

Utah Ethics Opinion

Utah State Bar Ethics Advisory Opinion Committee

September 30, 2015

ISSUE

1. When may a lawyer directly contact a. former employee who had been within the control group of an adverse party such as a corporation?

OPINION

2. A lawyer may contact a former employee who had been within the control group of an adverse party, but may not communicate about any matters that are covered by the attorney-client privilege. The lawyer may only communicate about the former employee's observations that were not communicated to corporate counsel, and may not ask about any communications with the corporate counsel or discuss any work product that resulted from those communications.

FACTS

3. Lawyer represents client in employment discrimination case. The proposed witness to be interviewed is the former Human Relations Director (HRD) of the adverse corporation. The former HRD was the client contact for the adverse corporation. The former HRD tells client that he has all of the information needed to support client's case and knows of several more employment discrimination cases against the adverse corporation. Witness specifically asks the lawyer to contact him prior to his deposition. Lawyer does not have permission of opposing counsel to speak with the proposed witness and in fact was told to have no extra-judicial contact with the former HRD.

ANALYSIS

4. RPC 4.2(a) provides: "In representing a client, a lawyer 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."

5. As EAOC Opinion 04-04 explains, Rule 4.2 "does not bar a lawyer's unauthorized contact with *former* employees of a represented corporate defendant except in very limited circumstances. . . ."(emphasis added). Comment 19 similarly provides: "In general, however, a lawyer may, consistent with this Rule, interview a former employee of an organization without the consent of the organization's lawyer." However, because the HRD was a member of the control group, any interview of the HRD must be carefully circumscribed to avoid inquiring into privileged communications or work product.

6. Pursuant to Rule 504(d) of the Utah Rules of Evidence, the former HRD was a representative of the client.[1]He was a person who obtained professional legal services on behalf of the client. He was expected to act on the advice of counsel and most importantly, he was the individual selected and specifically authorized to communicate with opposing counsel concerning the legal matters involved in the ongoing lawsuit.

7. The advice and directions of opposing counsel to former HRD are communications under Evidence Rule 504(d)(5).[2] They are also "confidential communications" pursuant to Evidence Rule 504(d)(6).[3]

8. It is irrelevant that HRD was a natural person seeking legal advice and representation on behalf of the now defendant corporation. The Utah Supreme Court defined the scope of corporate representation *inMoler v. CWManagement Corp.*, 190 P.3d 1250 (Utah 2008):

We begin and end our analysis with a plain-language review of Utah Rule of Evidence 504:

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.

9. It is irrelevant that the person who received the confidential communications is no longer within the control group of the opposing party. The 1995 Revisions of the Model Rules of Professional Conduct replaced the prohibition of lawyer contact with a "party" to contact "with a person." Rule 4.2 (a)[4]

10. Commentators Hazard, Hodes and Jarvis provide guidance with respect to former employees covered by the attorney client privilege and work product doctrine.

Yet it seems clear that *some* former employees continue to personify the organization even after they have terminated their employment relationship. An example would be a managerial level employee involved in the underlying transaction who is also conferring with the organization's lawyer in marshalling the evidence on its behalf. This kind of former employee is undoubtedly privy to privileged information, including work product, and an opposing lawyer is not entitled to obtain such information without a valid waiver by the organization. [5]

11. The corporation did not give up its attorney client privilege when the HRD left its employ. The normal attorney client privilege which attached to communications between opposing counsel and the former HRD still exist. Work product produced by the former HRD at the request of opposing counsel does not lose its protection by reason of the resignation. Lawyer may not make extrajudicial inquiry into communications with counsel or work performed at the direction of counsel relevant to prospective or on-going litigation.

12. Conversely, the corporation has no rightful expectations of prohibiting the former HRD from sharing his observations of events not covered by the attorney client privilege or the work product doctrine. Such inquiry would be proper under Rule 4.2(d), as the former HRD is not a current member of the control group, a person whose acts or omissions could be attributed to the corporation, nor a representative of the corporation who could bind the corporation by his admissions.

13. It is incumbent upon the inquiring lawyer to make clear to the former control group member that the lawyer is only inquiring about matters OUTSIDE those covered by the attorney-client privilege.

14. Finally, while the results of receiving improper communications are not within the scope of this request, as an additional cautionary note, we reiterate what was recently observed in EAOC 15-02. Practitioners should bear in mind that a violation of 4.2, while serious, can perhaps generate more damaging consequences than an ethics complaint. "'(T)he most common setting for application of the no-contact rule has been in litigation, not in disciplinary proceedings. The courts have recognized, for example, that statements obtained in violation of rules like 4.2 may be excluded as evidence. More seriously, violation of the no-contact rule can result in disqualification of the offending lawyer.'" *Id.* ¶15, quoting The Law of Lawyering, § 41.02, 41-4.

Notes:

[1]Evidence Rule 504(d)(4) "Representative of the client" means a person or entity having authority:

(A) to obtain professional legal services;

(B) to act on advice rendered pursuant to legal services on behalf of the client; or

(C) person or entity specifically authorized to communicate with the lawyer concerning a legal matter.

[2] Evidence Rule 504(d)(5) provides "Communication" includes:

(A) advice given by the lawyer in the course of representing the client; and

(B) disclosures of the client and the client's representatives to the lawyer or the lawyer's representatives incidental to the professional relationship.

[3] Evidence Rule 504(d)(6) provides: "6) "Confidential communication" means a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

[4] Geoffrey Hazard, W. William Hodes & Peter Jarvis, THE LAW OF LAWYERING (3d) Section 38.6 at 38-10.

[5]The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct (3d ed. 2000, § 38.7 (Supp. 2011). *See also, Polycast Technology Corporation v. Uniroyal, Inc.,* 129 F.R.D. 621, 629 (S.D.N.Y. 1990) (Ex Parte contact allowed without a showing of access to privileged information by the former employee)
