Utah Ethics Opinions

1994.

115R. USB EAOC Opinion No. 115R

Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 115R, Opinion on Reconsideration

Approved July 29, 1994

I. Introduction

On May 20, 1993, the Board of Bar Commissioners of the Utah State Bar approved Ethics Advisory Opinion Committee No. 115, which found that Rule 4.2 of the Utah Rules of Professional Conduct does not prohibit a lawyer representing a private party from directly contacting a government official about a matter involving the attorney's client, even though the government agency was known to be represented by counsel. Subsequent to the approval of the opinion, the Office of Attorney General of Utah, the Statewide Association of Public Attorneys of Utah, and an individual from the Office of Attorney General, Richard L. King (collectively, "Petitioners") filed petitions for reconsideration of the opinion.

At the request of the Board of Bar Commissioners, the Ethics Advisory Opinion Committee has undertaken to review Opinion No. 115 and the legal and policy foundations that are involved with the issue. Upon full consideration of the Petitioners' arguments, the Committee finds that the Petitioners have not raised any issues that justify the reversal or modification of its original opinion. Accordingly, the Committee affirms Opinion No. 115, as issued.

II. Opinion No. 115 Holding

The holding in Opinion No. 115 consists of two basic elements: (1) Because private parties have certain inherent and constitutional rights to approach their government officials, they should not be restricted from seeking direct communication with those officials merely because they have employed an attorney to represent them. The Committee found this result to be consistent with the language and intent of Rule 4.2. (2) However, if an attorney representing such a private party contacts a government official directly, he must inform that official if there is a pending dispute with the official's agency involving the client and that he is representing the client in the dispute.1

III. Response to Petitioners' Arguments

A. Comment to Rule 4.2. Petitioners claim that Opinion No. 115 mistakenly relies on the Comment to Rule 4.2, which states that the rule does not serve to prevent a party from directly contacting an official of a government agency about a pending controversy.2 Petitioners note that the comment refers to "party," rather than the party's attorney. But, any *principal* (i.e., "party") is entitled to contact *any other* principal at *any* stage of a dispute.3 To restrict the use of "party" in this sentence to exclude the party's representative renders the comment vacuous. There would be no point to the inclusion of the quoted comment in the context of Rule 4.2 unless it were designed to refer to the right of the party's counsel to contact a governmental official.

It is all the more clear when Rule 4.2 is examined from a logical perspective. The basic rule identifies a class of *lawyer communications* that are proscribed. This class of communications (namely, certain lawyer-to-adverse-party communications) is then narrowed by the final clause, "unless the lawyer has the consent of the other lawyer or is authorized by law to do so." Thus, Rule 4.2 has nothing to do with communications from one party to another, but rather deals only with communications from one lawyer to a non-lawyer. The comment to Rule 4.2 relates to these lawyer-to-party communications; petitioners' interpretation of the use of the word "party" in the comment to Rule 4.2 completely ignores the context of the rule.

Corroborating this interpretation is a discussion about Rule 4.2 by C. W. Wolfram:

Requiring the consent of an adversary lawyer seems particularly inappropriate when the adversary is a government agency. Constitutional guarantees of access to government and statutory policies encouraging government in the sunshine seem hostile to a rule that prohibits a citizen from access to an adversary governmental party without prior clearance with the governmental party's lawyer.4

B. Equal protection and public-policy arguments. One of Petitioners' arguments centers around a perception that, under the U. S. or Utah Constitutions, government lawyers have a right to have the same rules apply to them as to non-governmental lawyers. At first glance, this argument has a superficial ring of plausibility to it, but it misses the point of whose interests are at stake in this issue. The important interest here is that of *thepublic*, not of the lawyers. In the Committee's judgment, it is more important to minimize the difficulties and obstacles that face private parties dealing with the government and its officials than it is to provide government agencies and officials with an

insulating layer of attorneys.5

Even more important, Petitioners' argument fails to recognize that, even assuming that the Utah Rules of Professional Conduct are legislative enactments that are due the protection of the U.S. and Utah Constitutions, it is only *unreasonable or arbitrary classifications* that are of concern. Where there is a basis for differentiation between private attorneys and governmental attorneys with regard to the operation of the Rules of Professional Conduct, that differentiation is not unconstitutional.6 As even Petitioners would admit, there are many reasons to apply the Rules of Professional Conduct differently to public attorneys. For example, it can be argued that the rules of disqualification and conflict of interest do not apply in the same way to private attorneys and to governmental law offices. Government lawyers are under different constraints than those in private practice.7

The government lawyer's duty is to seek justice and to represent the public interest, not necessarily to advocate victory for the client. Therefore, some of the ethical restrictions may not apply.8 For the same reason, because it is the government lawyer's duty to protect the public interest, including the right of access to government, Rule 4.2 can be interpreted to allow an attorney representing a private party to contact a government agency in the absence of the government lawyer who represents the agency. In addition, it should be noted that nothing in Opinion No. 115 would prohibit government lawyers from contacting agency personnel on a matter in which the governmental lawyer represents an opposing agency.

In any event, as Opinion No. 115 points out and Petitioners have ignored, a governmental agency is free to instruct its employees that they should refer contacts from private parties' attorneys to a designated agency attorney. The opinion didn't (and couldn't) *require* an agency official to speak to a litigant's lawyer. If a government agency believes its employees are susceptible to the evils of overreaching attorneys, they may instruct them to refer all matters in dispute to the designated agency counsel.

A corollary point is that government entities should be deemed to be able to look after their own interests. The usual application of Rule 4.2 is to protect a private party from an overreaching attorney who tries to bring undue influence or pressure on the party in the absence of that person's attorney. It is hard to see how this public-policy consideration applies to the very government that ostensibly serves the people in general and has access to the most powerful of mechanisms in dealing with the citizenry.

In sum, important public-policy considerations favor Utah citizens' access to their government, not the abstract "right" of a government lawyer to serve as a buffer between agency and public citizen.

C. The California Rule. One of the observations made by petitioners is that the Utah Bar cannot rely on the "California rule"9 to support its conclusion to allow private-party-attorneys direct access to government officials. Opinion No. 115 recognizes that the California rule employs language different from Utah's Rule 4.2, but the citation was included only to emphasize that one state has seen fit to clarify the potentially ambiguous language of ABA Model Rule 4.2 (which Utah adopted) to make it clear that the language of Model Rule 4.2 is not intended to provide government agencies with attorney "buffers."10

As an aside, the Committee also notes that petitioners' implications that Opinion No. 115 is an anomalous result relative to other states' ethical considerations is (1) not correct, and (2) irrelevant. Although the jurisdictions are split, other states have reached conclusions similar to Opinion No. 115.11 But, in any event, the Committee believes that Rule 4.2 and sound public policy require the result in Opinion No. 115, independent of how other states have interpreted various rules, such as the (old) Code of Professional Responsibility.12

D. Despite his exceptions to Opinion No. 115, Petitioner King concedes that parties should indeed have the right of access through representatives, but would exclude lawyer contacts in favor of contacts by "lobbyists and special interest groups." Why a party who wishes to contact a government official should be restricted to a direct personal contact or a "lobbyist" is unfathomable. Indeed, Petitioner seems to be suggesting a non-lawyer lobbyist could represent a party's legal interests in some way, a relationship that might run into Utah Code Ann. § 78-51-25, which deals with the unauthorized practice of law.

E. First Amendment Considerations . Petitioners devote a portion of their arguments to a discussion of the U. S. Supreme Court's tests that find certain limits on lawyers' speech to be constitutional. Their recitation of the law is perhaps correct, but it has no relevance here. The foundation of Opinion No. 115 does not claim that the State cannot regulate attorneys' speech in certain circumstances. The First Amendment rights on which the Opinion is focused are the private-party client's rights-not those of the attorney. No one would quibble with Petitioners' recitation of the holdings in *Gentile v. State Bar of Nevada* 13 and other lawyer-speech cases. But they have nothing to do with Opinion No. 115's concern for the First Amendment government-access rights of individuals.

IV. Conclusion.

Accordingly, the Ethics Advisory Opinion Committee reaffirms Opinion No. 115 as originally issued, believing

that it is a correct interpretation of the letter and intent of Rule 4.2 and the accompanying comment, as well as sound public policy that properly weighs the government-access rights of the public, vis-à-vis the rights of the class of government attorneys.

Footnotes

1. The full text of the holding of Opinion No. 115 is:

Because the Utah and United States Constitutions guarantee all private citizens access to government, all communications, whether oral or in writing, with employees or officials of a government agency under any circumstances are permitted. Thus, a lawyer representing a government office or department may not prevent his non-government counterpart from contacting any employee of the government office or department outside the presence of the government attorney, whether or not the communication involves a matter in litigation. However, if counsel for a private party contacts a government employee about pending litigation, counsel must inform the government employee (a) about the pending litigation or that the matter has been referred to agency counsel and (b) about his representation of a private party in that litigation.

Utah Ethics Adv. Op. No. 115 (1993).

2. Rule 4.2 does not apply to "communications authorized by law." The comment to Rule 4.2 indicates "communications authorized by law [as used in Rule 4.2] include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter."

3. Charles W. Wolfram, *Modern Legal Ethics* 614 and n.51 [§ 11.6.2] (West 1986).

4. *Id.* at 614 [§ 11.6.2] (citations omitted).

5. It is perhaps significant that Petitioners do not explain how Opinion No. 115 hampers or prevents government itself (as distinguished from its lawyers) from carrying out its responsibilities and duties to the public. Their focus is on the government's lawyers, not their clients.

6. *See State v. J.B. & R.E. Walker, Inc.* , 100 Utah 523, 116 P.2d 766 (1941).

7. *See also* Utah Ethics Adv. Op. No. 142 (Mar. 10, 1994), in which the Utah Attorney General's Office sought and obtained an advisory opinion that recognizes the different character of that office vis-à-vis private-practice firms for purposes of imputed conflicts of interest under Rule 1.10.

8. *See* ABA Formal Ethics Op. 342; Ford v. State, 628 S.W.2d 340 (Ark. 1982); *Environmental Protection Agency v. Pollution Control Bd.*, 372 N.E.2d 50 (Ill. 1977).

9. (A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

. . . .

(C) This rule shall not prohibit . . . [c]ommunication with a public officer, board, committee, or body.

Calif. Rules of Professional Conduct 2-100.

10. So far as the Committee can determine, no one has successfully challenged California's Rule 2-100 on the grounds that it violates the U. S. or California Constitutions.

11. *See, e.g.,* Calif. Rules of Professional Conduct 2-100(c); Iowa Ethics Op. 87-29 (1988), ABA/BNA Lawyers' Manual on Professional Conduct 901:3608 (interpreting analogous provision in DR 7-104); Tenn. Ethics Op. 82-F-27 (1982), ABA/BNA Lawyers' Manual on Professional Conduct 801:8106 (interpreting DR 7-104); N.Y. State Bar Ass'n Opinions, No. 404 (1975).

12. For example, Code of Professional Conduct DR 7-104(A)(1) is analogous to Utah's Rule 4.2.

13. 501 U.S. ____, 111 S. Ct. 2720, 111 L. Ed. 2d 888 (1991).

Rule Cited:

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