120 REPRESENTING AN ORGANIZATION AS A PARTY IN A DISPUTE

Adopted May 17, 2008.

Introduction and Scope

This Opinion addresses certain ethical obligations of a lawyer who represents an organization as a party in a dispute. For purposes of this Opinion, "dispute" includes both matters in litigation and pre-litigation matters, such as investigations. This Opinion does not address the ethical obligations of a lawyer who concurrently represents an organization in a dispute and one or more constituents of the organization or others who are not constituents.

This Opinion complements Rule 4.2 and cmt. [7] of the Colorado Rules of Professional Conduct (Rules) and CBA Formal Ethics Opinion 69, "Propriety of Communicating with Employee or Former Employee of an Adverse Party Organization" (rev. 1987; add. 1995). Formal Opinion 69 was issued under the Colorado Code of Professional Responsibility, and it continues to provide guidance to the Bar with the adoption of the Rules in 1993. Rule 4.2 and Formal Opinion 69 address the propriety of communicating with current or former employees of an adverse party organization. However, Rule 4.2 and Formal Opinion 69 do not address the ethical obligations of the lawyer representing the organization. As with Formal Opinion 69, this Opinion does not address issues relating to the attorney-client privilege.

Syllabus

A lawyer employed or retained by an organization represents the organization and owes duties to the organization itself. Although the organization acts through its authorized constituents such as stockholders, directors, officers, agents, and employees, the lawyer representing the organization does not automatically represent these individual constituents merely by virtue of representing the organization.

In general, it is improper for a lawyer who represents an organization to assert that he or she represents some or all of the constituents of the organization unless the lawyer reasonably believes he or she has in fact been engaged by the constituent or constituents. Knowingly making such an assertion without having a reasonable belief that he or she has in fact been engaged by the constituent or constituents would violate Rule 4.1 on truthfulness in statements to others. Further, such an assertion may violate Rule 3.4(a), which prohibits unlawfully obstructing another party's access to evidence.

When the lawyer represents an organization and when the lawyer knows or reasonably should know that the interests of the organization are adverse to those of the non-client constituents with whom the lawyer is dealing, the lawyer must clarify his or her role. In this circumstance, the lawyer should advise the constituent that the organization is the lawyer's client, that a conflict of interest may exist between the organization and the constituent, that the lawyer does not and cannot represent the constituent, and that the constituent may wish to obtain independent representation. Further, in such circumstances, the lawyer must inform the constituent that he or she cannot assert the attorney-client privilege with regard to communications between the constituent and the lawyer.

Under Rule 3.4(f), a lawyer is prohibited from requesting a person other than a client to refrain from voluntarily giving relevant, non-privileged information to another party unless (1) the person is a relative or employee or other agent of a client and the lawyer is not prohibited by other law from making such request *and* (2) the lawyer reasonably believes the person's interest will not be adversely affected by refraining from giving such information.

Opinion

Representing the Organization as Client

The ethical issues encountered by lawyers representing organizations flow from the unique legal status of organizations. *See Restatement (Third) of the Law Governing Lawyers*, § 96, cmt. b (Rationale: an Organization as Client). Organizations are legal fictions. Legally, organizations have separate existence, but they act only through natural persons as their constituents such as shareholders, directors, officers, and employees. At the threshold, it is critical to identify the client and to maintain that clarity throughout the representation.

A lawyer who is employed or engaged by an organization represents the organization as the client, *not* the organization's individual constituents. Rule 1.13 provides:

> A lawyer employed or retained by an organization represents the organization which acts through its duly authorized constituents.

This fundamental principle is echoed in Comments [1] and [2] to Rule 1.13:

> [1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.
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> [2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

Similarly, comment b to Section 96 of the *Restatement of the Law Governing Lawyers* explains:

> The lawyer who has been employed or retained to represent an organization as a client owes professional duties of loyalty and competence to the organization. By representing the organization, a lawyer does not thereby also form a client-lawyer relationship with all or any individuals employed by it or who directs its operations or who have an ownership or other beneficial interest in it, such as its shareholders. However, additional circumstances may result in a client-relationship with constituents while the lawyer concurrently represents the organization (see Comment h hereto).

The Lawyer for an Organization Client Does Not Automatically Represent its Constituents

Rule 4.2 prohibits a lawyer, in representing a client, from communicating about the subject of the representation with a person a lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law or court order. More specifically, Comment [7] to Rule 4.2 addresses the case of a represented organization.

Sometimes, lawyers representing an organization assert that they "automatically" represent some or all of the current or former constituents of the organization, either because of confusion about the identity of the clients under the Rules or otherwise. In turn, this raises an issue for the adverse party's lawyer under Rule 4.2.

Courts have rejected the assertion that a lawyer representing an organization automatically represents its employees, because an attorney-client relationship cannot be formed unilaterally, at the direction of the lawyer or the organization. *Harry A. v. Duncan*, 330 F.Supp.2d 1133, 1141 (D.Mont. 2004); *Banks v. Office of the Senate Sergeant-at-Arms*, 222 F.R.D. 1, 12-13 (D.D.C. 2004); *Michaels v. Woodland*, 988 F.Supp. 468, 472 (D.N.J. 1997); *Terra Int'l. v. Mississippi Chemical Corp.*, 913 F.Supp. 1306, 1316-17 (D.Ia. 1996); *Carter-Her-*

man v. City of Philadelphia, 897 F.Supp. 899, 903 (E.D.Penn. 1995); *Brown v. Joseph County*, 148 F.R.D. 246, 251 (N.D. Ind. 1993). The Utah State Bar Ethics Advisory Opinion Committee has reached a similar conclusion. Utah State Bar Ethics Advisory Opinion Committee, Opinion 04-06 (December 2, 2004).

> Colorado law is in accord. Though in a different context, the Colorado Supreme Court concluded: an attorney-client relationship is 'established when it is shown that the client seeks and receives the advice of the lawyer on the legal consequences of the client's past or contemplated actions.' *People v. Morley*, 725 P.2d 510, 517 (Colo. 1986). The relationship may be inferred from the conduct of the parties. *Id.* The proper test is a subjective one, and an important factor is whether the client believes that the relationship existed. *In re Petrie*, 154 Ariz. 295, ___, 742 P.2d 796, 800-01 (1987).

People v. Bennett, 810 P.2d 661, 665 (Colo. 1991) (applying R.P.C. 1.8(a), involving business transactions with a client).

A lawyer who knowingly asserts that he or she represents current or former constituents of an organization automatically or unilaterally, without having a reasonable belief that he or she has in fact been engaged by the constituents, may violate at least two separate Rules. First, a lawyer knowingly making such an assertion without having such a belief would violate Rule 4.1 on truthfulness in statements to others.

Second, a lawyer who unilaterally asserts that he or she represents current or former constituents of an organization may violate Rule 3.4. Among other things, Rule 3.4(a) prohibits a lawyer from "unlawfully obstruct[ing] another party's actions as to evidence. . . ." If a lawyer asserts that an attorney-client relationship exists with current or former constituents of an organization client without actually have an attorney-client relationship with the constituents, the effect is to prevent the adverse party's lawyer from communicating *ex parte* with those constituents without the consent of the lawyer, pursuant to Rule 4.2. In this situation, the lawyer making the assertion may be unlawfully obstructing the adverse party's access to evidence in violation of Rule 3.4(a). *See* Utah State Bar Ethics Advisory Opinion Committee, Opinion 04-06.

Clarifying the Lawyer's Role in Dealing with Non-Client Constituents

When the lawyer represents only the organization and when the lawyer knows or reasonably should know that the interests of the organization client are adverse to those of non-client constituents with whom the lawyer is dealing, the lawyer must clarify his or her role.[1] Rule 1.13(f) provides:

> In dealing with an organization's directors, officers, employees, members, shareholders and other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

Comments [10] and [11] to Rule 1.13 amplify the lawyer's duty in this situation:

> There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization, of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for the constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.
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> Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Requesting a Person Other Than a Client to Refrain From Providing Information to Another Party

Under Rule 3.4, it is unethical for a lawyer to request a person other than a client to refrain[2] from voluntarily giving non-privileged information to another party, except in certain, limited circumstances. In particular, Rule 3.4(f) prohibits such efforts to limit an adverse party's access to persons other than the lawyer's clients *unless* two conditions are met: (1) that the person is a relative or an employee or agent of a client and the lawyer is

not prohibited by other law from making the request, *and* (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information. The purpose of this Rule is addressed in Comment [4]: "Paragraph (f) permits a lawyer to advise relatives and employees of a client to refrain from giving information to another party because the relatives or employees may identify their interests with those of the client. See also Rule 4.2. However, other law may preclude such a request. *See* Rule 16, Colorado Rules of Criminal Procedure."

Thus, a lawyer who represents an organization client may request a non-client constituent to refrain from voluntarily giving information to another party only if, among other things, the lawyer considers the effect that not providing such information would have on the constituent and only if the lawyer reasonably believes that the person's interests will not be adversely affected thereby.

These considerations depend on the facts in a particular case, but two examples illustrate common situations. In a truck driving accident, such a request of the constituent truck driver ordinarily would be appropriate. In contrast, in a class action alleging race or gender discrimination in employment, such a request of constituents who might have suffered from the discrimination would not be appropriate, because the constituent's interests might be adversely affected thereby.

NOTES

1. This is analogous to the lawyer's duties in dealing with unrepresented persons generally. *See* Colo. R.P.C. 4.3 and comments.

2. As noted above, this Opinion does not address issues relating to the attorney-client privilege. The substantive evidentiary issues of privilege are addressed in numerous treatises. *E.g.,* American Bar Association, Section of Litigation, 1 The Attorney-Client Privilege and the Work Product Doctrine at 141-179 (Edna Selan Epstein, ed., 5th ed. 2007).