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UTAH STATE BAR

Ethics Advisory Opinion Committee

Opinion No. 00-07

Approved June 2, 2000

Issue: Do the Utah Rules of Professional Conduct prohibit a lawyer licensed to practice in Utah from participating in an association of lawyers that would use joint letterhead, with a disclaimer that the association "is an affiliation of independent attorneys-not a partnership?"

Opinion: A lawyer does not violate the Utah Rules of Professional Conduct if he participates in an association or affiliation of individual lawyers and law firms, provided that he adheres to the applicable rules regarding conflicts of interest and disclosure of confidential information. However, it would be misleading, and therefore a violation of the Rules, for the lawyer to participate in such an association or affiliation if its members were to practice under a common firm name and were to use joint letterhead. The inclusion of a partnership disclaimer would not cure the misleading nature of the letterhead concerning the relationship among the attorneys.

Facts: A Utah lawyer desires to associate himself with lawyers who are licensed to practice law in various foreign countries. Under the proposed arrangement, the members of the association would not be partners, but would be independent practitioners. It is not clear from the facts whether the lawyers participating in the association would merely refer clients to each other or whether they would also have some kind of a financial arrangement. The lawyers would use joint letterhead, which would identify the association as follows:

A, B, C & D

International Lawyers [Address]

Offices: Representative

A, Admitted: State,Country United Kingdom

B, Admitted: Country European Union

C, Admitted: Country Russia

D, Admitted: State, Country Asia

A,B,C & D is an affiliation of independent attorneys—not a partnership.

Analysis: A lawyer's communications regarding the lawyer's services, including the designation of the lawyer's firm and the lawyer's letterhead, must comply with the requirements of Rules 7.1, 7.4 and 7.5 of the Rules.

Rule 7.1 states that "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." (fn1) Rule 7.5 governs firm names and letterheads, and subsection (d) is applicable to the analysis in this case: "Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact." (fn2) The obligation of the lawyer not to mislead third parties is further delineated by Rule 7.4, which outlines the limits of the lawyer's communication of his fields of practice and states that, while allowed to indicate that his practice is limited to specific areas of practice, a lawyer cannot communicate that he is a specialist, unless otherwise permitted by the rule. (fn3)

The practice of law has evolved from the traditional model of a partnership with a single law office to various, more fluid forms of relationships among lawyers, which range from structures similar in nature to a partnership to arrangements that merely contemplate mutual referrals. It has now become common practice for lawyers to associate or become affiliated with other lawyers or law firms in different states or countries by way of some form of strategic alliance or participation in national or international networks. While these creative forms of association may provide a legitimate service to clients in a shrinking world, nonetheless they remain circumscribed by the Rules.

The Utah Rules allow an attorney to practice law in association with attorneys licensed in other states or in other countries. In Opinion No. 96-14, we concluded that a "Utah attorney may . . . associate with individuals who are also licensed to practice law in any jurisdiction within the United States or with persons qualified and authorized to engage in the functional equivalent of U.S. legal practice under the laws of a foreign country," as long as the Utah attorney abides by the prohibitions of Rule 5.5(a) (the attorney cannot practice in a jurisdiction in which the attorney is not licensed in violation of the regulations of the legal profession of that jurisdiction), Rule 5.5(b) (the attorney cannot assist anyone who is not a Utah attorney in engaging in the unauthorized practice of law in Utah), and Rule 7.5(b) (the letterhead of a law firm with offices in

more than jurisdiction must disclose the jurisdictional limitations of the attorneys in the firm). (fn4) The Committee concluded that under the Rules "there is no ethical prohibition against forming a partnership or sharing revenue from legal practice with non-Utah lawyers," because "a non-resident lawyer is not considered a 'nonlawyer' for purposes of the Utah rules against fee splitting and formation of partnerships with lay persons." (fn5)

However, Opinion 96-14 did not address the issue of whether it would be ethical for the lawyers participating in the association to practice law under a common name and to use joint letterhead in the event that the association did not take the form of a partnership or otherwise operate as a law firm, with sharing of revenues and liabilities and with pooling of resources. The discussion was limited to the propriety of the letterhead used by the lawyers under Rule 7.5(b), which expressly refers to the case of a law firm with offices in more than one jurisdiction. The opinion allows such a law firm to use the same name in each jurisdiction, provided that the letterhead clearly identifies any jurisdictional limitations on each attorney within the firm.

In the present case, on the other hand, the inquirer wishes to join in an affiliation of lawyers that is not in fact a law firm in the traditional sense and whose members are not partners, but independent practitioners. In Formal Opinion 94-388, the ABA Committee on Ethics and Professional Responsibility (the "ABA Committee") acknowledged the difficulty of defining the exact nature of a relationship among different lawyers or law firms in an era that has witnessed the proliferation "of so many ways in which law firms relate to one another (and with which they describe them)." (fn6) The ABA Committee made it clear, however, that, whatever the form of their relationship is and however their relationship is denominated, attorneys who decide to associate with one another in the practice of law must comply with two fundamental ethical obligations: (i) the "obligation not to misstate what a law firm has to offer," which derives from the provisions of Rule 7.1, 7.5(a) and 7.5(d), and (ii) "the obligation to assure that a client of one firm is aware of the relationship between that firm and any other firms with which it is involved insofar as the relationship may give rise to conflicts of interest, the sharing of fees, or certain other interactions that implicate the Model Rules of Professional Conduct." (fn7)

Thus, a firm may affiliate with another firm if the relationship among the affiliated attorneys is "close and regular, continuing and semi-permanent, and not merely that of forwarder-receiver of legal business." (fn8) However, it may do so only if its representations (such as those in letterhead) do not deceive, and this will be met only "if a full description of any relationship the firm may have used in marketing its services is provided to all prospective clients as to whom the lawyer reasonably believes the relationship may be relevant, and to all present clients to whom the lawyer reasonably believes the relationship may be relevant if at any time any of those relationships change." (fn9) Moreover, in the event that the relationship goes beyond mutual referrals or joint advertising and becomes more substantial, the attorneys must address any conflicts of interest that might arise among the clients of the different attorneys, and they must be sensitive to issues related to disclosure of confidential information.

The arrangement under review presents an additional dimension: The members of the proposed affiliation would not retain their separate identities and simply communicate that they are affiliated with one another, but would instead hold themselves out to the public under a common name and under a joint letterhead.

On more than one occasion, we have concluded that, pursuant the provisions of Rules 7.1, 7.5(a) and 7.5(d), the use of firm names that imply either partnership when in fact there is no partnership or an otherwise misleading relationship among lawyers is not permitted. (fn10) The ABA Committee reached a similar conclusion when, in addressing the ethical implications of the use of a licensed name by a network of law firms, it determined that "in contrast to the situation in which several firms are associated but retain their own identities, the use of the same name by all the firms in a network will effectively represent that they are all offices of one and the same firm" and thus will violate both Rules 7.1and 7.5(a). (fn11) Furthermore, other states have consistently observed that the listing of the attorneys' names in the "firm" name and letterhead conveys to the general public the appearance of a partnership and thus is misleading when, in fact, the attorneys are not organized as a partnership. (fn12)

In its letterhead, the proposed association attempts to remove the confusion that might be created by the use of a common name by inserting a disclaimer to the effect that "*A, B, C, & D* is an affiliation of independent attorneys—not a partnership." The issue is whether such a disclaimer would be sufficient to counter the appearance of a partnership relationship and to eliminate any expectations that (a) the attorneys participating in the association would share liabilities and responsibilities and (b) a client of one of the listed attorneys would also have available the resources and expertise of the other attorneys.

The majority of the states that have considered the use of partnership disclaimers in firms' letterheads has come to the conclusion that such disclaimers do not cure the impropriety in the use of a common name by attorneys who are not in fact partners. (fn13)

Moreover, this Committee has previously determined that, in the context of a franchise arrangement by which law firms would market their services under a common trade name, a disclaimer on the letterhead would not be sufficient to prevent the arrangement from being misleading to the public. (fn14)

There are several concerns surrounding the use of a disclaimer as a possible remedy to the misunderstanding created by a misleading letterhead. First, the contrast between, on the one hand, the use of a firm name that comprises the individual names of the attorneys (which has traditionally been associated with the existence of a partnership) and, on the other hand, the disclaimer of partnership may generate more confusion than bring clarity. What has been referred to as the "yes" and "no" quality of the disclaimer (fn15) undermines the ability of the disclaimer language to remove the implications of a firm name that is misleading. The Committee declines to assume that everyone would carefully read the disclaimer. Equally as important, not everyone would clearly understand the combined meaning of the firm name and the disclaimer, given the technical aspects of the concept of partnership that are implied by the firm name and the vagueness of the concept of "affiliation of independent attorneys" that is offered to the reader as an interpretation of the relationship among the attorneys.

Furthermore, it has been correctly observed that it would be impossible for the partnership disclaimer to accompany the firm name constantly and everywhere. The firm name would sooner or later appear without disclaimer (for instance, in a telephone book, on a building directory, or in answering the phone), and the misleading effects of the firm name would be left without remedy. (fn16) Finally, the Committee notes that a literal interpretation of the Rules does not support the use of a disclaimer as a cure for a communication that is otherwise misleading. Rule 7.5(d) simply provides that "lawyers may state or imply they practice in a partnership or other organization *only when that is the fact.*" (fn1) **7**

Thus, we conclude that the use of a common name and joint letterhead by the proposed association, notwithstanding the presence of the disclaimer, could be interpreted by clients, potential clients and the public in general as representing that the attorneys are all members of the same law firm and that they are prepared to share liability and responsibility. Consequentially, it is misleading and its use would be unethical. (fn18)

Another aspect of the letterhead submitted by the inquirer contributes to its misleading nature. The name of the association is accompanied by the words "international lawyers." Although the expression is unclear, its insertion in the letterhead right below the association's name seems to refer to an alleged international dimension of the practice of the lawyers belonging to the association, rather than to the mere fact that those lawyers are based and licensed in different countries.

Under Rule 7.4, a lawyer may communicate to the public that his practice is limited to specific areas of the law, if that is in fact the case, but may not "hold himself out publicly as a specialist and shall not indicate any certification or designation as a specialist," unless he is admitted to practice as a patent attorney or unless indication of a certification or designation as a specialist is "[i]n accordance with any plan regulating lawyer specialization approved and promulgated by the Utah Supreme Court." (fn19) In addition, a lawyer's communications regarding his fields of practice, on a letterhead or elsewhere, are subject to the "false and misleading" standard of Rule 7.1. Such restrictions are justified by the fact that, as observed by the United States Supreme Court, communications of area of practice are potentially misleading and that "[f]alse claims of expertise are a real danger to those who need and are searching for legal services." (fn20)

The Utah Supreme Court does not recognize attorneys as specialists (with the exception of patent and trademark attorneys) and, more specifically, does not recognize a specialization in international law. Even though the proposed letterhead does not expressly state that the members of the association are "specialists" or "certified" in international law, (fn22) Thus, we conclude that the designation appears to be misleading and may violate Rules 7.4 and 7.5(a) by improperly suggesting that all lawyers participating in the proposed association are experts in international law. (fn23)

Conclusion: Even though the proposed letterhead attempts to clarify the nature of the relationship among the members of the association by disclaiming partnership, it falls short of meeting the mandate of Rule 7.1 not to deceive the lawyers' clients and the public in general. The letterhead seems to comply with the provisions of Rule 7.5(b) by identifying the jurisdictional limitations on the individual lawyers participating in the association. However, the Committee concludes that the lawyers' use of joint letterhead, designating the association by a common name, is misleading and therefore is in violation of Rules 7.1, 7.5(a) and 7.5(d). Furthermore, the designation "international lawyers" suggests that the lawyers participating in the association have a special competence in the area of international law, which appears to violate Rules 7.4 and 7.5.

Appendix

Rule 7.1. Communications concerning a lawyer's

services.

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) Is likely to create an unjustified expectation about results the lawyer can achieve, or state or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

(c) Compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

Rule 7.4. Communications of fields of practice.

A lawyer may communicate the fact that the lawyer will accept employment in specified areas of practice. A lawyer whose practice is limited to specified areas of practice may communicate that fact. A lawyer shall not hold himself out publicly as a specialist and shall not indicate any certification or designation as a specialist, except as follows:

(a) A lawyer admitted to practice before the United States Patent and Trademark office may use the designation "patent attorney" or a substantially similar designation; and

(b) In accordance with any plan regulating lawyer specialization approved and promulgated by the Utah Supreme Court.

Rule 7.5. Firm names and letterheads.

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1

(b) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

Footnotes

1. Utah Rules of Professional Conduct 7.1. See the Appendix for the full text of the rule.

2. *Id.* Rule 7.5. The Appendix contains the full text of Rules 7.5(a), (b) and (d).

3. *Id.* Rule 7.4, which is also given in the Appendix.

4. Utah Ethics Advisory Op. 96-14, 1997 WL 45139 (Utah St. Bar).

5. *Id.* Rule 5.4(a) prohibits a Utah lawyer from sharing fees with a nonlawyer, and Rule 5.4(b) prohibits the lawyer from forming a partnership with a nonlawyer for the purpose of practicing law.

6. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 388 (1994).

7. *Id*.

8. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 351 (1984).

9. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 388 (1994).

10. Utah Ethics Advisory Op. No. 95-04, 1995 WL 283027(Utah St. Bar) (use of a trade name by law firms pursuant to a franchise agreement is inherently misleading because it implies partnership); Utah Ethics Advisory Op. No. 139, 1994 WL 579849 (Utah St. Bar) (attorney cannot use firm name that includes the words "& Associates" if his firm does not currently employ any lawyer associates); Utah Ethics Advisory Op. No. 86 (Utah St. Bar 1989) (solo practitioners cannot use common letterhead implying in any way that they are partners); Utah Ethics Advisory Op. No. 34 (Utah St. Bar 1976) (lawyers who are not partners and only share office space cannot use common firm name and telephone number on letterhead).

11. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 388 (1994). See also ABA Comm. on Ethics and Professional Responsibility, Informal Op. 966 (1966) (letterhead referring to "Smith and Smith" implies partnership).

12. *E.g., In re Weiss, Healey & Rea*, 109 N.J. 246, 268, 536 A.2d 266 (1988) (message conveyed by the firm name "A, B & C" is the practice of law as partners); Mich. Standing Comm. on Professional and Judicial Ethics, Op. No. RI-200, 1994 WL 154942 (Mich. St. Bar 1994) (joint letterhead implies lawyers belong to same law firm); Pa. Ethics Op. 93-124, 1993 WL 851228 (Pa. Bar Ass'n 1993); Ohio Advisory Op. 89-36, 1989 WL 535040 (Ohio St. Bar 1989); New Jersey Ethics Op. 593, 1986 WL 175259 (N.J. St. Bar 1986); Ky. Advisory Op. E-299 (Ky. St. Bar 1985); Ore. Advisory Op. 1991-12 (Or. St. Bar 1991) ("A, B & C,

Attorneys at Law" misleading if no partnership among attorneys exists); Neb. Advisory Op. 80-10 (Neb. State Bar Ass'n, undated).

13. *See, e.g.*, Mich. Ethics Op. No. RI-200; Neb. Ethics Op. 80-10; Pa. Ethics Op. 93-124; N.J. Ethics Op. 593, all *supra*, note 12. *See also* Pa. Ethics Op. 85-100, 1985 WL 291423 (Pa. Bar Ass'n); Ohio Advisory. Op. 89-36, *supra* footnote 12 (disclaimers such as "An Association of Independent Attorneys," "Not a Partnership," or "A Non-Partnership Association" are confusing and do not clarify misleading nature of common letterhead used by attorneys sharing office space); Or. Ethics Op. 486 (Or. St. Bar 1983). *But see* Tenn. Ethics Op. 84-F-82, 1984 WL 262049 (Tenn. Bd. Prof. Resp.) ("An Association of Attorneys" following names of members of association properly identifies members of association and additional disclaimer "Not a Partnership" is not necessary); *cf.* Tex. Ethics Op. 478, 1993 WL 840537 (St. Bar of Tex.1993).

14. Utah Ethics Advisory Op. No. 95-04, 95 WL 283827(Utah St. Bar).

15. *See* Pa. Ethics Op. 85-100, supra, note 13.

16. *See, e.g.*, Neb. Ethics Op. No. 80-10; Pa. Ethics Op. 85-100; Pa. Ethics Op. 93-124; and N.J. Ethics Op. 593; all *supra* note 13.

17. A similar observation has been made by the Nebraska Advisory Committee in Op. No. 80-10, *supra*, note 13, with respect to DR2-102(C), the substantially similar predecessor of Rule 7.5(d).

18. The Committee believes that, in order to comply with the applicable Rules of Professional Conduct, the lawyers participating in the association would have to maintain their independent identities in their communications to the public regarding their services and use separate letterheads. As set forth in ABA Formal Op. 351, the lawyers could indicate in their respective letterheads that they are associated or affiliated with one another, provided that their relationship is "close and regular, continuing and semi-permanent, and not merely that of forwarder-receiver of legal business" and provided further that the lawyers make full disclosure to their clients and prospective clients of the implications of the relationship and that they are sensitive to issues related to confidentiality and conflicts of interest,. Moreover, the lawyers would need to comply with ABA Formal Op. 388, which requires that lawyers who are associated with one another fully and accurately describe in their communications to the public the exact nature of their relationship, since "the use of one or two word shorthand expressions," such as "affiliation" or "association," would not prevent the communication from being misleading. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 388 (1994).

19. Utah Rules of Professional Conduct 7.4.

20. *See In re* R.M.J., 455 U.S. 191 (1982).

21. A specific certification for attorneys that practice in the field of international law has been established by the Florida Bar in 1997. Rule 6-21.2 of the amended Rules Regulating the Florida Bar defines international law as "the practice of law dealing with issues, problems, or disputes arising from any and all aspects of the relations between or among states and international organizations as well as the relations between or among nationals of different countries, or between a state and a national of another state, including transactional business transactions, multinational taxation, customs, and trade. The term 'international law' includes foreign and comparative law."

22. *See* Tex. Ethics Op. 440, 1987 WL 109870 (St. Bar of Tex.) (designation "personal injury lawyers" in firm letterhead and business cards permissible only if all attorneys practice in that area). Cf. Pa. Ethics Op. 95-04, WL 935621 (Pa. Bar Ass'n 1995) (joint ad of law firm and solo practitioner stating areas of practice implied solo practitioner's expertise in those areas and was misleading).

23. *See* S.C. Advisory Op. 96-03, 1996 WL 914246 (S.C. Bar Ass'n) (placement of terms "Master Mariner," "First Class Pilot," "Marine Consultant" in letterhead implied attorney's specialty in admiralty law and was misleading).

Rules Cited:

7.17.47.5