

## Utah Ethics Opinions

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UTAH STATE BAR

Ethics Advisory Opinion Committee

Opinion No. 03-03

Issued June 23, 2003

¶ 1 **Issue:** Is it ethical for a lawyer to advertise to provide legal services in Social Security Administration hearings to claimants who have been denied benefits, where nonlawyers are used by the lawyer in providing these services?

¶ 2 **Opinion:** With due consideration for the rules governing advertising and supervision of nonlawyer assistants, it is not unethical for a lawyer to use nonlawyer paraprofessionals to provide representation of clients in hearings before a government agency that authorizes nonlawyer representation. In particular, the lawyer does not assist the nonlawyer paraprofessional in the unauthorized practice of law under these circumstances. (fn1)

¶ 3 **Background:** The United States Social Security Administration permits nonlawyers to appear at hearings as representatives of claimants challenging the denial of Social Security benefits. The hearings are evidentiary and require representatives of claimants to offer direct testimony and to cross-examine adverse witnesses. Lawyers who represent claimants for Social Security Administration benefits often use nonlawyer paraprofessionals to represent the clients in the agency hearings. These lawyers advertise their services in Social Security Administration matters, but commonly do not disclose in the advertisements that the client's representative at the hearing is normally a nonlawyer paraprofessional.

¶ 4 **Analysis:** We have been asked whether an advertisement placed by a lawyer to provide legal services in Social Security Administration hearings to claimants who have been denied Social Security benefits must disclose that the lawyer normally uses nonlawyer paraprofessionals in making appearances for claimants in such hearings.

¶ 5 **Advertising Rules.** The first step in the analysis is to review the rules governing advertising. First, "[s]ubject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical,

outdoor advertising, radio or television, or through written or recorded communication." (fn2) But, any advertisement for the lawyer's legal services must comport with Rule 7.1(a):

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. (fn3)

As the comment to the Rule emphasizes, "This Rule applies to all communications concerning the lawyer's services, including advertising materials." (fn4)

¶ 6 Thus, a disclosure concerning the use of paraprofessionals would only be required if it were necessary to make the advertisement "considered as a whole, not materially misleading." But, lawyers routinely provide legal services through the use of nonlawyer paraprofessionals and, indeed, are encouraged to do so to make legal services affordable to the broadest spectrum of the population. Thus, we conclude that the advertisement in question is not materially misleading if it does not disclose that the services are often provided through nonlawyer paraprofessionals.

¶ 7 *Delegation to Nonlawyers.* Social Security Administration rules and regulations permit the appearance of nonlawyer representatives for claimants in Social Security Administration hearings challenging the denial of benefits. (fn5) Without such authority, paraprofessionals would ordinarily not be allowed to provide unassisted representation of a client in an evidentiary hearing. Given the Social Security Administration's authorization of nonlawyer professionals to appear as representatives of claimants at its hearings, a lawyer does not act unethically in delegating to paralegals the representation of clients at these hearings. However, the lawyer must comply with his supervisory responsibilities under Rule 5.3, (fn6) which permits nonlawyer paraprofessionals to "act for the lawyer in rendition of the lawyer's professional services." (fn7) Rule 5.3 requires, however, that the lawyer provide nonlawyer paraprofessionals appropriate supervision and retain responsibility for their work. (fn8)

¶ 8 Because the definition of the practice of law in Utah is an issue of law, the Committee is without authority to decide what is and what is not the unauthorized practice of law. However, for purposes of this opinion, we assume that it is not the unauthorized practice of law for a lawyer to use nonlawyer paraprofessionals in administrative hearings as permitted by the agency's applicable rules and regulations.

Therefore, so long as the lawyer adequately supervises the work delegated to the paraprofessional and retains responsibility for the paraprofessional's work, the lawyer would not violate Utah Rule of Professional Conduct 5.5(b), which prohibits a lawyer from aiding another person in the unauthorized practice of law. (fn9)

¶ 9 *Consent.* A lawyer may not, however, delegate to a nonlawyer paraprofessional the representation of the client before an agency proceeding such as a Social Security Administration hearing without consulting with the client as required by Rules 1.2 and 1.4 regarding the means of representation of the client.

¶ 10 Rule 1.2 requires that the lawyer discuss with the client the relative advantages and disadvantages of being represented at the hearing by a nonlawyer paraprofessional, as opposed to being represented by a licensed lawyer. (fn10) Rule 1.4(b) requires that this matter be explained to the client to the extent reasonably necessary to enable the client to make informed decisions regarding the representation. (fn11) Therefore, the lawyer must discuss with the client the lawyer's intention to delegate the representation of the client at the hearing to a paraprofessional. This discussion must be sufficiently in advance of the hearing that the client will not be prejudiced if he decides to change counsel. If the lawyer regularly delegates paraprofessionals to represent clients at Social Security Administration hearings, the lawyer should discuss with the client at the time of engagement the lawyer's normal practice of using a nonlawyer paraprofessional as the client's representative at the hearing.

¶ 11 It is good practice, although not required by the Utah Rules of Professional Conduct, that the lawyer enter a written engagement agreement with the client disclosing that a nonlawyer paraprofessional may represent the client at the administrative hearing. (fn12)

¶ 12 **Summary:** It is not unethical for a lawyer to advertise to provide representation of claimants denied benefits in Social Security Administration hearings, so long as the advertisement is not false or misleading and otherwise complies with Rules 7.1 and 7.2 of the Utah Rules of Professional Conduct. If an administrative agency, such as the U.S. Social Security Administration, authorizes representation of parties in administrative hearings by nonlawyer representatives, it is not unethical for a lawyer to use nonlawyer paraprofessionals to provide representation of clients in such hearings, so long as the paraprofessional is adequately trained and supervised by the lawyer and the lawyer retains responsibility for the work.

¶ 13 If the lawyer ordinarily provides representation of clients in Social Security Administration hearings using

nonlawyer paraprofessionals, the lawyer's advertisement is not false or misleading solely because the lawyer's use of nonlawyer paraprofessionals in providing these services is not disclosed in the advertisement. Rule 1.2 requires that the lawyer discuss with the client the objectives of the representation and the means by which the objectives will be pursued. The lawyer should discuss with the client at the initial stages the lawyer's intention to use a nonlawyer paraprofessional as the client's representative at the hearing. Rule 1.4(b) requires that the lawyer explain the advantages and disadvantages of the representation of the client in the hearing by a nonlawyer paraprofessional supervised by the lawyer to an extent reasonably necessary to enable the client to make an informed decision regarding who will appear at the hearing as the client's representative. Under the assumptions set forth in this opinion, the lawyer does not assist the nonlawyer paraprofessional in the unauthorized practice of law under these circumstances.

#### Footnotes

1. It is not the province of the Committee to decide what is the unauthorized practice of law. This is an issue of law for the courts. In rendering this opinion, we have assumed that it is not the unauthorized practice of law for a lawyer to use non-lawyer paraprofessionals in federal administrative hearings as permitted by the federal agency's applicable rules. *See, e.g., Sperry v. State ex rel. Florida Bar*, 373 U.S. 379, 385-402 (1963); *see also In re: Florida Bar Advisory Opinion*, 571 So. 2d 430 (Fla. 1990).

2. Utah Rules of Professional Conduct 7.2(a) (2003).

3. *Id.*, Rule 7.1(a).

4. *Id.*, Rule 7.1, cmt. Also, under the current rules, "A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used." *Id.* Rule 7.2(b). We note that this provision does not appear in the current ABA Model Rules of Professional Conduct that resulted from the ABA's Ethics 2000 project. Although Utah may ultimately adopt this deletion as it considers the new ABA Model Rules, Rule 7.2(b) is still a requirement for attorney advertising in Utah. Also, under current Utah Rule 7.2(d): "Any communication made pursuant to this Rule shall include the name of at least one lawyer responsible for its content." The new ABA Rule 7.2(d) broadens this to "at least one lawyer or law firm."

5. A number of administrative agencies permit representation of parties in administrative hearings by nonlawyers. The analysis in this opinion is equally applicable to hearings before such agencies.

6. "A lawyer having direct supervisory authority over the

nonlawyer shall make reasonable efforts to insure that the person's conduct is compatible with the professional obligations of the lawyer." Utah Rules of Professional Conduct 5.3(b) (2003).

7. *Id.*, Rule 5.3, cmt.

8. *See generally* Utah Ethics Advisory Op. 99-02, at 1-2, 1999 WL 260749, <http://www.-utahbar.org/opinions> (Utah St. Bar). There, we stated that determination of "adequate supervision" of a nonlawyer assistant requires a case-by-case analysis. At a minimum, the nonlawyer assistants must be appropriately trained and their performance of professional services monitored and evaluated.

9. "Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3." Rule 5.5, cmt.

10. Under Rule 1.2 provides:

(a) A lawyer shall abide by a client's decisions concerning the objectives of the representation, subject to paragraphs (b), (c), (d), and shall consult with the client as to the means by which they are to be pursued. . . .

(b) A lawyer may limit the objectives of the representation if the client con-sents after consultation.

Utah Rules of Professional Conduct 1.2 (2003).

11. "A lawyer shall explain a matter to the extent reasonably necessary to enable the client to make informed decisions regarding the representation." *Id.* Rule 1.4(b).

12. We understand that engagements to represent claimants at Social Security Administration hearings are commonly performed under a contingency-fee agreement. If the lawyer's services are to be provided for a contingent fee, the agreement must be in writing. Utah Rules of Professional Conduct 1.5(c) (2003). Also, pursuant to 42 U.S.C. § 406(a)(1), "[t]he Commissioner of Social Security may prescribe rules and regulations governing recognition of agents or other persons, other than attorneys as hereinafter provided, representing claimants . . . ." The written fee agreement provides an excellent opportunity for the lawyer to memorialize the discussion with the client of the use of a nonlawyer paraprofessional as the client's representative at the administrative hearing.

**Rules Cited:**

**1.21.45.35.57.17.27.3**