

Utah Ethics Opinion

2012.

12-03. UTAH STATE BAR ETHICS ADVISORY
OPINION COMMITTEE Opinion Number 12-03

Opinion No. 12-03

Issued December 13, 2012

ISSUE 1. May a community association management company profit from legal work performed by the company's in-house attorney?

OPINION

2. A community association management company's profiting from legal work performed by the company's in-house attorney constitutes the improper sharing of fees with a non-lawyer in violation of Utah Rule of Professional Conduct 5.4(a).

BACKGROUND

3. An attorney is employed as in-house counsel for a community association management company. Although the company does not profit from the legal work the attorney performs, the company believes that other community association management companies routinely profit from the legal work performed by their respective in-house attorneys. Specifically, these companies collect a fee from their clients for legal services at a rate that is higher than the cost the companies incur in employing their corporate attorneys. The issue addressed in this Opinion stems from this practice.

ANALYSIS

4. Rule 5.4(a) of the Utah Rules of Professional Conduct, 'Professional Independence of a Lawyer,' sets out the basic principle that applies to the issue presented. It reads in relevant part: '[a] lawyer or law firm shall not share legal fees with a nonlawyer'

5. As its title suggests, the purpose of Rule 5.4 is to protect the professional independence of lawyers and prevent problems that might otherwise occur when non-lawyers, such as corporate employers, assume positions of authority in business arrangements with lawyers. See ABA Comm. on Prof-l Ethics and Responsibility, Formal Op. 392 (1995) [hereafter ABA Op.].

6. These arrangements cause particular concern because non-lawyers are not bound by the ethical mandates

regarding independence, conflicts of interest, confidentiality, fees, and other important provisions that govern lawyers- conduct. See *id.* Without these constraints, non-lawyers are free to pursue their own interests, which may be disadvantageous and detrimental to their clients- best interests. See *Emmons, Williams, Mires and Leech v. State Bar*, 86 Cal.Rptr. 367, 372 (1970) ('[F]ee splitting between lawyer and layman . . . poses the possibility of control by the lay person, interested in his own profit, rather than the client-s fate').

7. For example, in the situation presented to the Committee, some community association management companies have been establishing and charging clients fees for legal services provided by in-house counsel. Although the Committee has not been presented with any evidence suggesting that these fees are excessive, there is nothing to prevent these companies from setting unreasonable rates-something an attorney could not do under Utah Rule of Professional Conduct 1.5. This causes special concern because these companies are, by their nature, highly motivated by profits and concerned with the 'bottom line.' See ABA Op.

8. Rule 5.4(a) eliminates this and other problems by preventing non-lawyer employers from viewing and using their legal departments as profit centers. This conclusion is significantly bolstered by the opinions of several other ethics committees who have considered this issue. Indeed, there appears to be a consensus that non-lawyer employers may not profit from the legal work performed by their in-house or corporate attorneys. See e.g., Va. State Bar Standing Comm. on Legal Ethics, Op. 1838 (2007) ('[C]orporate counsel cannot be used to generate profits for an employer, as that would be considered fee splitting with a non-lawyer and a violation of Rule 5.4(a).'); State Bar of Ariz. Comm. on the Rules of Prof-l Conduct, Op. 99-12 (1999) ('A lawyer employed by an architectural firm may not provide legal services to the firm-s clients, where the firm pays the attorney a salary but charges the clients an hourly rate for the lawyer-s services, because of . . . impermissible fee-sharing with non-lawyers.');

ABA Comm. on Prof-l Ethics and Responsibility, Formal Op. 392 (1995) ('If a corporate in-house lawyer provides services to third persons for a fee, the lawyer violates Model Rule 5.4(a) if the lawyer turns over to the corporation any portion of the fee beyond the cost to the corporation of the services provided.');

Tex. Prof-l Ethics Comm., Op. 490 (1993) ('A lawyer who is a salaried employee of a bank may not under the Texas Disciplinary Rules of Professional Conduct participate in the preparation of loan application documents for bank customers if the bank charges the customers a specific fee for the lawyer-s services with respect to the

loan application documents.');

Ala. State Bar Office of Gen. Counsel, Op. 1992-13 (1992) ('A fee-splitting problem under Rule 5.4 exists only when a non-lawyer agency makes a profit from the rendition of legal services by one of its salaried lawyers.');

Ill. State Bar Ass-n, Op. 90-20 (1991) ('In this case, the consumer-client would pay the institution for the preparation of the trust. The institution would then keep a portion of that fee and provide payment to the attorney. This sharing of legal fees violates Rule 5.4(a).');

N.Y. State Bar Ass-n Comm. on Prof-l Ethics, Op. 618 (1991) ('[T]he evil arises only when a lay agency earns a profit from the rendition of legal services by its salaried employee.');

Phila. Bar Ass-n Prof-l Guidance Comm., Op. 88-26 (1988) ('[E]xtraordinary care must be taken to insure that [an employer] does not receive more compensation from the client for legal services than is paid to the lawyer.');

Mass. Bar Ass-n Ethics Comm., Op. 84-1 (1984) ('[I]t would be unethical fee-splitting for a non-lawyer employer of an attorney to bill a third party more for that attorney-s services than the actual cost of such services to the employer . . .');

Dallas Bar Ass-n Legal Ethics Comm., Op. 1982-3 (1982) ('An attorney is considered to be sharing legal fees with a nonlawyer or forming a partnership with a nonlawyer for the practice of law if the employing corporation reaps any benefit, reward or profit from the attorney-s provision of legal services to third parties.').

9. As a closing point, the Committee notes that non-lawyer employers may not circumvent the principles discussed today by arguing that they technically do not profit from the legal services performed by their in-house or corporate attorneys because the funds they receive from those activities would, in total, be less than the costs of running a legal department or hiring corporate counsel. As explained by the ABA, [t]he Committee does not believe that this argument changes the analysis. The corporation is still reaping more than reimbursement for its costs of employing its lawyers, and even if the funds were to be pumped back into the legal department, the corporation still would have the same incentive to interfere with the independence of the lawyer to maximize its ability to recoup its losses or free up funds for the corporation-s general use. *Id.*

CONCLUSION

10. If an attorney-s non-lawyer employer receives any profit from the attorney-s provision of legal services to third parties, the attorney is considered to be improperly sharing fees with a non-lawyer in violation of the Utah Rules of Professional Conduct 5.4(a).