17-07

Opinion No. 17-07

Utah Ethics Opinion

Utah State Bar Ethics Advisory Opinion Committee

September 10, 2017

ISSUE

May an active member of the Utah State Bar act as a licensed real estate agent independently of the practice of law? If so, do the Utah Rules of Professional Conduct apply to non-legal services and what issues exist if the attorney agent is required to share fees with the non-attorney broker with whom the real estate agent is associated?

OPINION

An active member of the Utah State Bar may act as a licensed real estate agent, but is still bound by all of the Utah Rules of Professional Conduct (the "Rules") governing general attorney conduct. This is because attorneys remain subject generally to the Rules simply by virtue of being admitted to the Utah State Bar, regardless of the nature of the attorney's services or business. However, if the attorney complies with Rule 5.7, Part I of the Rules will not generally apply as discussed hereafter.

The scope of the application of the Rules to the real estate services provided by an attorney is governed by Rule 5.7, which dictates that the Rules apply in their entirety, if an attorney either provides non lawyer services that are not distinct from the attorney's provision of legal services, or, in the case of services provided through an entity controlled in part or whole by an attorney, if the lawyer fails to take reasonable measures to ensure that the third party knows the services are not legal services and that the protections of an attorney-client relationship do not exist. If, on the other hand, the attorney providing services through an entity he controls, alone or with others, takes reasonable measures, then the Rules' confidentiality, conflicts, independence and similar rules do not apply to the attorney's relationship with the third party.

Additionally, Rule 5.4 would not prohibit the lawyer/realtor from sharing a real estate commission where no legal services were provided and Rule 5.7 was followed. However, Rule 1.7(a) and aspects of Rule 1.8, and perhaps others, would prohibit the lawyer from referring clients to such to a separate law-related entity controlled by the attorney, individually or with others.

ANALYSIS

An attorney is required to abide by the applicable Rules and is subject to discipline for violation of the Rules (except as otherwise modified by Rule 5.7), even if not engaging in the actual practice of law, and even if anyone dealing with the attorney does not know the attorney is a licensed attorney. *See* Attorney's Oath, Para. 1, Preamble to the Rules ("…I will faithfully observe the Rules of Professional Conduct …"); Para. 3, Preamble to the Rules, ("[T]here are rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation."); *see also Notopoulos v. Statewide Grievance Comm.*, 890 A.2d 509, 518 (Conn. 2006) ("[I]t is well established that '[t]he Rules of Professional Conduct bind attorneys to uphold the law and to act in accordance with high standards in both their personal and professional lives.'"); *Atty. Grievance Commn. of Maryland v. Ruffin*, 798 A.2d 1139, 1147 (Md. 2002) ("[T]his Court has held that an attorney who has been admitted to the bar of this State and has not tendered a resignation remains subject to the disciplinary authority of this Court…."); *Iowa S.Ct. Bd. of Prof. Ethics and Conduct v. Mulford*, 625 N.W.2d 672, 679 (Iowa 2001) ("This court's authority to discipline a lawyer admitted to practice in this state is not suspended merely because the attorney does not hold an active license and is not actively engaged in the practice of law.").

Accordingly, regardless of whether an attorney is providing legal or non-legal services, and even if the attorney complies with Rule 5.7 as described below, the attorney is still subject to those rules that apply generally to lawyer conduct. *See, e.g.*, Rule 8.4 (providing that it is professional misconduct for an attorney to "violate or attempt to violate the Rules of Professional Conduct . . ."). Likewise, legal duties independent of the Rules, such as the law of principal and agent, govern the legal duties owed to those receiving law-related services. *See* Comment 11, Rule 5.7.

Rule 5.7, *Responsibilities Regarding Law-Related Services*[1], recognizes that when an attorney provides "law related services," there is the possibility of confusion regarding the professional nature of the relationship between the attorney and the third party receiving the services. Rule 5.7 provides that the Rules will apply to an attorney's provision of law-related services as follows:

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related

services, if the law-related services are provided:

(a)(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(a)(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to ensure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

The principal reason for the Rule is because "[w]hen a lawyer performs law-related services or controls an organization that does so, there exists the … possibility that the person for whom the law-related services are performed fails to understand that the services [are not subject to] the protections normally afforded as part of the client-lawyer relationship." Comment 1, Rule 5.7. For example, the recipient of the law-related services may believe that rules of confidentiality, conflicts, independence and similar rules apply to the relationship. Therefore, if an attorney engages in law-related services, but does not intend for the full application of the Rules, the attorney must make the law-related services clearly and unequivocally distinct from any legal services and an attorney-client relationship. Furthermore, if the attorney is acting through an entity the attorney controls individually or with others, the attorney must take "reasonable measures" to ensure that a person using law-related services understands there is no attorney-client relationship and understands the effect and significance of the inapplicability of the Rules.

Under Rule 5.7, the first issue presented is whether an attorney acting as a real estate agent is providing "law-related" services. Although the Committee does not have all of the details of the specific proposed real estate activities, it is the Committee's general opinion that a licensed attorney acting as a real estate agent under the supervision of a broker is providing "law-related services" as that term is used in Rule 5.7. The term "law-related services" is defined in Rule 5.7(b) as follows:

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

The Committee's opinion that the attorney is providing law-related services is based in part on Comment 9 to the Rule, which lists examples of law-related services, including: "providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting." Prior opinions of the Committee support that opinion. *See* Utah Ethics Advisory Op. 01-05, 2001 WL 829237 (Utah State Bar) (attorney functioning in law-related profession of real estate brokerage who holds himself out as an active or inactive lawyer, will be subject to the Utah Rules of Professional Conduct while engaged in the law-related profession); Utah Ethics Advisory Op. 30 (Utah State Bar, Oct. 14, 1976) (attorney who is president of a title company must comply with the ethics rules of a lawyer in both occupations); Utah Ethics Advisory Op. 17 (Utah State Bar, Nov. 28, 1973) (lawyer engaged in a real estate business is held to the ethical standards of a lawyer in both occupations); Utah Ethics Advisory Op. 5 (Utah State Bar, Jan. 13, 1972) (attorney selling life insurance is held to ethical standards of an attorney in both professions). *See also* Utah Ethics Advisory Op. 02-04. Opinion 02-04 and Opinion 01-05 issued prior to Utah's adoption of Rule 5.7, which occurred in 2005.

However, the Committee also notes that the attorney could also be practicing law in the given scenario if the attorney performs more than clerical acts as a real estate agent or broker. The Supreme Court defines the "practice of law" as the

representation of the interests of another person by informing, counseling, advising, assisting, advocating for or drafting documents for that person through application of the law and associated legal principles to that person's fact and circumstances.

Rule 14-802. Section (c)(12)(A) of that Rule specifically addresses real estate agents and brokers, and provides that a "real estate agent or broker licensed by the state of Utah may complete State-approved forms including sales and associated contracts directly related to the sale of real estate and personal property for their customers" without being an attorney and thus exempts those actions from the definition of "practice of law." However, non-clerical activities such as drafting contracts, including drafting addenda to a State-approved form, and providing advice regarding contract interpretation, representations and warranties, the application of environmental or zoning laws to a real estate transaction, and other similar real estate matters, do constitute the "practice of law" under Rule 14-802. If the attorney is performing any of these services, then Rule 5.7 does not apply, and the attorney's actions are fully governed by the Rules.

The second question presented is what constitutes "reasonable measures" to ensure that the person obtaining the law-related services knows that the services are not legal services and that the protections of the attorney-client relationship do not exist. The Rules generally provide guidance to an attorney undertaking "reasonable measures" to ensure that a person using law-related services

understands the effect and significance of the inapplicability of the Rules. Rule 1.0(f) provides the requirements for obtaining "informed consent" and states follows:

(f) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Comment 6 to Rule 1.0 provides further direction and examples of what is required to obtain "informed consent," and states in part:

The communication necessary to obtain [informed] consent will vary according to . . . the circumstances giving rise to the need to obtain informed consent . . . . Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. . . . In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. . . .

At a minimum, the lawyer should clearly explain to the person receiving law-related services the significance of the relationship with the person not being a client-lawyer relationship. *See* Comment 6, Rule 5.7 (also recommending the communication be in writing). The burden is upon the lawyer to demonstrate that reasonable measures under the circumstances have been taken so that the person receiving the law related services understands the significance. *See* Comment 7, Rule 5.7. Because legal services and law-related services are so closely connected, it may not even be possible to comply with Rule 5.7. *See* Comment 8, Rule 5.7 ("Under some circumstances, the legal and law-related services may be so closely intertwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of this Rule cannot be met"). However, if an attorney can undertake the reasonable measures described by Rule 5.7, then the Rules' confidentiality, conflicts, independence and similar rules of Part I do not apply to the attorney's relationship with the third party. *See e.g.*, Comment 1, Rule 5.7.

Additionally, Rule 5.4 may also apply to the situation described if any legal services are rendered or if Rule 5.7 is not complied with as described above. Rule 5.4(b) prohibits attorneys from forming "a partnership or other business entity with a nonlawyer if any of the activities of the entity consist of the practice of law." For example, if an attorney forms a business entity with a nonlawyer to offer "law-related" services, such as a real estate agency, the company cannot also provide legal services. Under that circumstance, Rule 5.4 would not prohibit the sharing of fees because there are no legal services rendered. Moreover, Rule 7.1 may also be an issue if the attorney were to offer legal services in the situation described. In that case, the lawyer and business entity could not jointly advertise because it could create the misconception that the business and law practice are combined, which could violate Rule 7.1 regarding misleading statements regarding an attorney's services.

Finally, a separate issue can arise if an attorney-client relationship exists with a person who is referred by the attorney to a separate law-related entity controlled by the attorney, individually or with others. In such a circumstance, the attorney must comply with Rule 1.8(a), which is the conflict rule regulating an attorney's business and similar transactions with a client. *See* Comment 5, Rule 5.7; *see also In re Est. of Brown*, 930 A.2d 249, 253–54 (D.C. App. 2007) ("There is no question that Smith, [an attorney], the sole owner of Smart Choice, entered into a business transaction with Glover by agreeing to market the townhouse through a listing agreement that would earn her a 3% commission upon sale."); *In re Conduct of Spencer*, 330 P.3d 538, 541 (Or. 2014) ("The accused argues that, when he agreed to act as Smith–Canfield's real estate broker, he was not entering into a 'business transaction' with her within the meaning of RPC 1.8(a). We reach a different conclusion. The commentary to ABA Rule 1.8 explains that that rule applies to transactions that are both unrelated and related to the subject of the legal representation.").

Notes:

[1] There may be conflicts between the Utah Rules of Professional Conduct and the Real Estate Code of Ethics. This opinion does not address any such conflicts or the application of the Real Estate Code of Ethics to the issue.
