

Utah Ethics Opinions

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129. USB EAOB Opinion No. 129

Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 129

Approved March 11, 1993

Issues: The U.S. Supreme Court found that, in Nevada, a portion of Rule 3.6 of the Rules of Professional Conduct concerning trial publicity is void for vagueness. Does this result have any effect on the viability of Utah's Rule of Professional Conduct 4.4, which proscribes certain lawyer communications and actions with respect to third persons?

Conclusion: No judicial decision applicable to Utah has addressed Rule 4.4 under a U. S. Constitutional analysis analogous to the U. S. Supreme Court's decision in *Gentile v. State Bar of Nevada*.¹ Accordingly, Utah attorneys remain bound by the ethical requirements of Rule 4.4. This Committee takes no position on the merits of a future challenge to Rule 4.4 that might be mounted on constitutional grounds or any other legal theory.

Discussion: This opinion arises out of a case that involved the actions of a plaintiff's lawyer who disseminated copies of a civil complaint to a newspaper in the city where defendant was employed by a professional sports team. The distribution of the complaint was apparently made contemporaneously with its filing in a Utah court and prior to its service on defendant's counsel.

Complaints were lodged with the Utah State Bar by defendant's lawyer and by defendant's employer and were referred to the Committee on Ethics and Discipline.² The Defendant's lawyer's complaint was founded on an alleged violation of Rule 4.4 of the Utah Rules of Professional Conduct, which reads:

Respect for Rights of Third Persons

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

The Ethics and Discipline Committee summarily dismissed the complaint on motions filed by the respondent attorney and the Office of Bar Counsel. There was no ruling on the

merits of the complaints, and there was no recommendation to the Utah Board of Bar Commissioners for further action.

Subsequently, this Committee was asked to address the current status of Rule 4.4. The request was founded on the conjecture that the *Gentile* case's analysis of Rule 3.6, dealing with pre-trial publicity,³ may have a direct application to Rule 4.4.

A brief summary of *Gentile* is helpful in resolving this issue. In 1989, an attorney representing a defendant in a criminal case in Nevada conducted a press conference in response to the issuance of an indictment charging his client with certain crimes. At the press conference he made a prepared statement and answered questions. He was found by the Nevada Bar (as affirmed by the Nevada Supreme Court) to have violated Nevada Rules of Professional Conduct 3.6, which is identical to Utah's rule. On review, the U. S. Supreme Court found Rule 3.6 to be void for vagueness and that the attorney had not engaged in unethical conduct.

To the extent that Utah's Rule 3.6 is identical to the Nevada rule that the Supreme Court analyzed, one could conclude that Utah lawyers are subject to the same interpretation of acceptable behavior under Rule 3.6 as found by the Supreme Court in *Gentile*. However, there is no direct connection between Rules 3.6 and 4.4 that would justify the inference that Rule 4.4 has constitutional deficiencies or any other facial legal shortcoming. Therefore, it is beyond the scope of this Committee to extrapolate the *Gentile* result to Rule 4.4.

Although one might argue that a void-for-vagueness analysis similar to that developed by the *Gentile* opinion could be applied to Rule 4.4, the conclusion of such an analysis-and the interplay with a specific set of facts-is beyond the ability or authority of this Committee to decide. There is no clear, indisputable application of *Gentile* to Rule 4.4.

Accordingly, the Ethics Advisory Opinion Committee declines to consider a *Gentile* analysis of Rule 4.4 and advises that, in the absence of a decision by a court of competent jurisdiction that would overturn or limit the application of Rule 4.4, Utah attorneys are bound by the terms and conditions set forth in that rule.⁴

Footnotes

1. 501 U.S. ___, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991).

2. The Committee on Ethics and Discipline deals directly

with complaints of unethical conduct brought against individual attorneys. *See* "Procedures of Discipline of the Utah State Bar," Rules IV and IX, X and XI. The Ethics Advisory Opinion Committee, as the title suggests, will "prepare proposed written opinions concerning the ethical propriety of anticipated professional or personal conduct." Rules of Procedure for the Ethics Advisory Opinion Committee 1.

3. Rule 3.6(a) states, for example:

A lawyer shall not make or cause another to make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially influencing an adjudicative proceeding.

4. As with any statute or administrative regulation or ruling, an affected party who chooses to take action inconsistent with the current state of the law does so with the risks attendant to ultimately failing to establish its illegality.

Rule Cited:

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