

Utah Ethics Opinions

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Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 95-01

Approved January 27, 1995

Issue: Does the publication by a licensed attorney of a "How To" booklet on a legal subject matter violate the Rules of Professional Conduct?

Can the publishing lawyer limit his malpractice exposure by disclaimers placed in the booklet?

Opinion: Mere publication of a "How To" booklet does not violate the Rules of Professional Conduct; however, if the material proposed for publication contained gross distortions of law or fact, Rule 8.4 might proscribe its publication.

While disclaimers may be set forth in the materials, whether liability for malpractice exists is a matter of substantive law, not professional ethics.

Analysis: Publication of "How To" books and booklets on legal subject matters has been considered by the courts for several decades. Perhaps the most notable of these cases is the seminal case of *New York County Lawyers' Assoc. v. Dacey*. (fn1) A threshold issue in these cases has been whether the publication of such materials constituted the practice of law (and, therefore, the unauthorized practice of law if the author were a layman). Courts, as in *Dacey*, have held that publication of "How To" books (fn2) does not constitute the practice of law for several reasons:

(a) Publication of a legal text that purports to say what the law is does not constitute the practice of law;

(b) Similarly, publication of forms for all kinds of legal situations is a common activity and not the practice of law;

(c) In the mere publication of forms or text, there is no personal contact or relationship to any particular individual, nor is personal advice given on a specific problem peculiar to a designated or readily identified person. (fn3)

Beyond the issue of the practice of law, the First and Fourteenth Amendments to the Constitution of the United

States (dealing with freedom of speech and of the press and equal protection) (fn4) allow the publication and dissemination of materials not in violation of reasonable standards erected for the protection of society. (fn5)

Because the publication of "How To" books on legal subject matters is not the practice of law, the Rules of Professional Conduct would not proscribe publication. However, a lawyer publishing such materials would be bound by Rule 8.4, "Misconduct." Publishing grossly erroneous or misleading materials could be considered "conduct involving dishonesty, fraud, deceit or misrepresentation" in violation of Rule 8.4(c) or "conduct that is prejudicial to the administration of justice" and, therefore, in violation of Rule 8.4(d).6

On the separate issue of whether disclaimers can limit a publishing attorney's malpractice exposure, it is beyond the charge of this Committee to opine on what would be a matter of substantive law to be determined under the facts and circumstances of each case. It can be said, however, that there is no prohibition under the Rules for the insertion of disclaimers, subject to the caveats under Rule 8.4 discussed above.

Footnotes

1. 283 N.Y.S.2d 984 (App. Div.), rev'd, 287 N.Y.S.2d 422 (1967).

2. The materials in *Dacey* purported to advise readers how to avoid probate. Subsequently, other courts have held that advertisement and sale by non-lawyers of so-called "Divorce Kits," which include forms and instructions, do not constitute the unauthorized practice of law so long as no personalized legal advice is provided. *See, e.g., In re William R. Thompson*, 574 S.W.2d 365 (Mo. 1978); *State Bar v. Kramer*, 249 N.W.2d 1, 8-9 (Mich. 1976); *Oregon State Bar v. Gilchrist*, 538 P.2d 913, 916-19 (Or. 1975). *See also People v. Landlord Prof. Servs.*, 264 Cal. Rptr. 548, 553 (Ct. App. 1989) (same result with respect to eviction and unlawful detainer forms and instructions).

3. *Dacey*, 283 N.Y.S.2d at 997-98.

4. U.S. Const. amends. I & XIV, § 1.

5. 283 N.Y.S.2d at 1000-01.

6. The lawyer requesting this opinion formerly served as a law clerk for a Utah district court judge. Current and former judicial law clerks should also be aware that their statements and proprietary ventures may be subject to additional restrictions imposed, for example, by Utah Code

of Judicial Admin. §§ 4-201 through -207, 7-201 through -203 (currently being revised subject to the Utah Governmental Records Access and Management Act, Utah Code Ann. §§ 63-2-101 et seq. (1993 & Supp. 1994)), Utah Code of Judicial Admin., ch. 12 (Code of Judicial Conduct); and the terms of employment imposed upon judicial law clerks by some courts regarding confidentiality and proprietary ventures.

Rule Cited:

8.4