

Utah Ethics Opinions

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Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 00-03

Approved March 9, 2000

Issue: May a Utah lawyer who is also a real estate title officer ethically enter into a partnership with or form a small business corporation with a nonlawyer for the purpose of assisting clients in challenging their real estate taxes?

Opinion: No. Even if the proposed activities can also be performed lawfully by nonlawyers, a lawyer may not ethically form a partnership or other business association with a nonlawyer if any of the activities of the partnership consist of the "practice of law." Nor may a lawyer practice with or in the form of a business organization if a nonlawyer owns an interest in that organization. A lawyer may form a business relationship with a nonlawyer to engage in such activities only if the lawyer withdraws entirely from the active practice of law.

Facts: A lawyer who is currently licensed to practice law in Utah is also licensed as a real estate title officer. He owns a title company and practices law part time. He proposes to form a small business corporation with a nonlawyer to assist clients in challenging their real estate taxes in return for a percentage of any resulting decreases in taxes. Each shareholder would have equal ownership. The corporation would also offer similar services to Utah counties in return for a percentage of any resulting increases in tax revenues. The request suggests that most but not all challenges on behalf of taxpayers would be resolved without an appearance before the applicable tax board or commission. The request claims that nonlawyers may assist taxpayers in proceedings before such tax boards and commissions. (fn1)

Analysis: Rule 5.4 imposes limitations on a lawyer's affiliation with nonlawyers in order "to protect the lawyer's professional independence of judgment." (fn2) Rule 5.4(b) prohibits a lawyer from "form[ing] a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law." (fn3) Here, the request proposes equal ownership with a nonlawyer of a small business corporation. That form of affiliation presents, however, no

less of a threat to the lawyer's professional independence of judgment than does a partnership. We conclude, therefore, that Rule 5.4(b)'s ethical prohibition applies to the proposed arrangement. (fn4)

The issue presented to this Committee is, therefore, whether the representation of taxpayers in tax commission proceedings for the purpose of challenging real estate tax assessments is "the practice of law" within the meaning of Rule 5.4.

The Rules do not define the practice of law. In interpreting Utah Code Ann. § 78-51-25, which prohibits the practice of law by those not licensed as lawyers, the Utah Supreme Court has held that activities prohibited to nonlawyers include a wide variety of activities beyond "appearing in court." (fn5) The Court has also stated:

The practice of law, although difficult to define precisely, is generally acknowledged to involve the rendering of services that require the knowledge and application of legal principles to serve the interests of another with his consent. It not only consists of performing services in the courts of justice throughout the various stages of a matter, but in a larger sense involves counseling, advising and assisting others in connection with their legal rights, duties, and liabilities. (fn6)

Here, the proposed affiliation with a nonlawyer is for the purpose of representing clients in adversary proceedings before local tax boards and commissions that will determine the extent of the client's tax liability under applicable law. Such advocacy would seem to fit comfortably within the Supreme Court's definition of the practice of law, as "assisting others in connection with their legal rights, duties and liabilities." (fn7)

The request alleges, however, that nonlawyers may lawfully assist taxpayers in proceedings before county tax boards. Whether or not this is true, the "practice of law" for purposes of Rule 5.4's ethical prohibitions on affiliations with nonlawyers may be broader than the "practice of law" for purposes of substantive law prohibitions on the unauthorized practice of law. Rule 5.4 and its predecessors (fn8) have, at least, consistently been so interpreted in ABA ethics opinions and the ethics opinions of other state bars.

The ABA Committee on Ethics and Professional Responsibility has considered the application of Rule 5.4 on several occasions in factual contexts similar to that presented here. In 1940, the ABA Committee considered the propriety of a proposed partnership between a lawyer and a nonlawyer licensed to present patent applications to the United States Patent Office. Applying Canon 33, the

Committee held:

The representation of persons in the presentation of patent applications is the practice of law when performed by an attorney. Thus, an attorney may not form a partnership with a layman for the rendition of such services even though the layman is permitted to represent patent applications by the United States Patent Office. (fn9)

The ABA Committee modified this opinion four years later, allowing such a partnership, but only if the lawyer refrained completely from holding herself out as a lawyer in any regard.

We have held that certain activities constitute the practice of law when engaged in by a lawyer despite the fact that those activities may lawfully be engaged in by one not a lawyer. A lawyer may properly enter into partnership with a layman if the activities of the partnership *and of the lawyer member* are confined to those which may be carried on by the layman, *provided the lawyer renounces or refrains from holding himself out as a lawyer and from carrying on any activities which may not properly be carried on by the layman.* (fn10)

In 1961, the ABA Committee applied these same principles to a proposed partnership between a lawyer and a public accountant, holding that "[a]n attorney may not form a partnership with an accountant if the attorney has a separate law practice or if the partnership furnishes service which would be considered legal services if done by a lawyer." (fn11) The Committee clarified a year later that a lawyer could enter into a partnership with an accountant to perform services permissible for nonlawyers if the lawyer "withdrew[s] from the practice of law and refrain[s] from holding himself out as a lawyer." (fn12)

In 1973, after the adoption of the Model Code, the ABA Committee considered "whether a lawyer may properly have a partnership with a non-lawyer who is an agent licensed by the United States Treasury Department if the activities of the partnership are limited to those permitted to non-lawyers pursuant to [Treasury Department guidelines]." (fn13) Applying DR 3-103(A), the Committee held that "[t]he practice by a lawyer of representing others before the Internal Revenue Service is the practice of law." Citing Formal Opinions 297 and 305, the Committee acknowledged that, "if the lawyer does not hold himself out as a lawyer or maintain a law office, he properly (at least in theory) may form a partnership with an enrolled agent for the purpose of practicing before the Internal Revenue Service, provided that the activities of the partnership are limited to those that do not constitute the practice of law." (fn14)

Ethics committees in other states have also held that for

purposes of Rule 5.4 or its predecessors a lawyer may be engaged in "the practice of law" even if the same activities could be lawfully engaged in by a nonlawyer. The Kansas Ethics Committee, for example, held that "[r]epresenting someone in a social security appeal is the practice of law when done by a licensed attorney, regardless of whether such activity also can be performed by nonlawyers." (fn15)

The New York State Ethics Committee responded to an inquiry nearly identical to that presently before this Committee. They considered whether a lawyer might affiliate with a nonlawyer to represent homeowners in small claims proceedings to reduce real estate taxes, if the lawyer were to refrain from holding himself out as a lawyer.

Applying DR 3-103(A), which is identical to Rule 5.4(b), the New York Committee found that the proposed activity was the "practice of law" for purposes of the ethical prohibition on a partnership with a nonlawyer.

We have no difficulty in concluding that the activity proposed here a lawyer representing homeowners in judicial or administrative proceedings challenging real estate taxes constitutes the practice of law. When a lawyer represents a client in a litigation or quasi-litigation proceeding, the lawyer is practicing law whether or not a nonlawyer is legally permitted to perform the same function. (fn16)

We agree. When a lawyer represents a client for a fee in an adversary proceeding that will determine legal obligations of the client, the lawyer is engaged in the practice of law for purposes of Rule 5.4's prohibitions on affiliation with a nonlawyer whether or not a nonlawyer may lawfully engage in the same representation. This is true whether the adversary proceeding takes place in a court of general jurisdiction or before an administrative agency, board or commission. In each instance, the lawyer is "advising and assisting others in connection with their legal rights, duties, and liabilities" (fn17) and is advocating the client's legal rights in a public tribunal. Such advice, assistance and advocacy is within the domain in which Rule 5.4 seeks to protect the lawyer's professional independence.

The request does not specify whether the lawyer intends to identify himself as a lawyer in connection with services rendered by the proposed small business corporation. The question arises, nonetheless, whether he could avoid Rule 5.4's ethical prohibitions on affiliation with a nonlawyer by refraining from holding himself out as a lawyer in connection with the proposed corporation.

The New York Committee considered this alternative and concluded that it was not an acceptable solution because it would violate ethical prohibitions against dishonesty and misrepresentation. The Committee reasoned that "both the adjudicating tribunal and the opposing party in the

proceedings challenging homeowners' real estate taxes are entitled to know that the homeowner's representative is a member of the bar, rather than a person untrained in legal proceedings." (fn18)

We believe there is force in this reasoning. In addition, so long as the lawyer continues actively to engage in the practice of law in other contexts, it cannot be truly said that he is not holding himself out as a lawyer. It will be publicly known that he is a lawyer whether or not he chooses to identify himself as such in connection with the proposed business with a nonlawyer. One can imagine that clients might seek him out over nonlawyers who render the same service for the very reason that he is trained as a lawyer and possesses the knowledge and skills associated with that training. So long as the lawyer is actively engaged in the practice of law in any context, he must be held to the standards of the legal profession, including Rule 5.4's prohibitions on affiliation with nonlawyers. (fn19)

This is not to say, however, that one trained and licensed as a lawyer may not choose to withdraw from that practice and pursue another profession. Consistent with ABA Opinions 201, 257, 297 and 305 discussed above, we believe that a lawyer who refrains from holding himself out as a lawyer in any context may enter into a partnership or other business association with a nonlawyer so long as he confines his activities to those in which a nonlawyer may lawfully engage. Thus, assuming that a nonlawyer can lawfully represent taxpayers before local tax boards and commissions, a current lawyer would be free to enter into the proposed partnership if he withdrew completely from the active practice of law.

Rule 5.4's prohibitions on affiliation with nonlawyers have been the subject of substantial criticism. (fn20) In August of 1999, the ABA Commission on Multidisciplinary Practice recommended that the Model Rules of Professional Conduct be amended to permit a lawyer (subject to certain regulations designed to safeguard the lawyer's professional independence) to partner with a nonlawyer even if the activities of the enterprise include the practice of law. Those recommendations have not yet been accepted, however, by the ABA House of Delegates. More importantly for our purposes, the Utah Supreme Court has not yet seen fit to amend Rule 5.4. Unless and until it does, Rule 5.4 prohibits affiliations by a lawyer with a nonlawyer of the kind proposed here.

Footnotes

1. In issuing this Opinion, we impose the following three assumptions and reservations:

a. We express no opinion on the legal issue of whether a small business corporation may provide legal services under

Utah law. Ethics Advisory Op. Comm. R. Proc. § III(b)(3).

b. As it is not relevant to the holding in this Opinion, we have not considered and express no opinion as to the ethical propriety of the contingent-fee arrangement described in the original request.

c. A determination of whether representation of taxpayers by nonlawyers before a tax board or commission is the unauthorized practice of law is beyond the scope of our jurisdiction, and we express no opinion on that issue. For purposes of this Opinion, we assume that such representation does not violate Utah law.

2. Rule 5.4 cmt.

3. Rule 5.4(d) provides a parallel prohibition with regard to practice in the form of a professional corporation: "A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for profit, if . . . [a] nonlawyer owns any interest therein . . ."

4. *See, e.g.*, S. Car. Ethics Op. 93-05, 1993 WL 851338 (S. Car. St. Bar 1993) ("Rule 5.4(b) applies not only to partnerships, but also to other organizations that lawyers are involved in managing.").

5. *Utah State Bar v. Petersen*, 937 P.2d 1263, 1267-68 (Utah 1997) (holding that a nonlawyer who had prepared wills, divorce papers and pleadings and conducted legal research on behalf of clients for a fee had engaged in the unauthorized practice of law in violation of § 78-51-25).

6. *Utah State Bar v. Summerhayes*, 905 P.2d 867, 869-70 (Utah 1995) (holding that the practice of "third-party adjusting-i.e., representing injured parties for the purpose of obtaining settlements from the tortfeasor's insurance company-is the unauthorized practice of law and rejecting arguments that such practice is authorized by the Utah Insurance Code).

7. *Id.*

8. Utah Rules 5.4(b) and (d) were adopted without modification from ABA Model Rules of Professional Conduct 5.4(b) and (d). Those sections are "substantially identical" to DR 3-103(A) and DR 5-107(C) in the Rules' predecessor, the ABA Model Code of Professional Responsibility. Those Code provisions had their origin, in turn, in ABA Canon 33, which provided: "Partnerships between lawyers and members of other professions or non-professional persons should not be formed or permitted where any part of the partnership's employment consists of the practice of law."

9. ABA Comm. on Ethics and Professional Responsibility,

Formal Op. 201 (1940).

10. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 257 (1944) (emphasis added).

11. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 297 (1961). *See also* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 239 (1942) (holding that "[i]t is improper for a practicing attorney to form a partnership with a certified public accountant to act as consultants in federal tax matters and represent taxpayers before the Bureau of Internal Revenue and the Board of Tax Appeals").

12. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 305 (1962), quoting ABA Formal Op. 225.

13. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 1241 (1973).

14. *Id.* at 496. The ABA Committee expressed skepticism, however, that those conditions could be met in practice: "[A]s a practical matter, it is difficult if not impossible for the Committee to visualize such a situation, and if any part of its activities could be construed to constitute the practice of law, such a partnership would be improper."

15. Kans. Ethics Op. LEO 93-11 (Kans. St. Bar 1993). *See also, e.g.*, Maine Ethics Op. No. 79 (1987) ("The 'practice of law' as used in rules like 3.2(a)(2) [parallel to Rule 5.4(b)] has typically been interpreted as including services in fact performed by lawyers . . . even though non-lawyers may and do perform the same service."); Mich. Ethics Op. CI-1117 (1986), quoting CI-25 ("[s]ome services, though a layman can perform them, may constitute the practice of law when performed by a lawyer—for example, the preparation of income tax returns"); N.Y.C. Bar Op. No. 80-25 ("Even if the services performed by a corporation may be done by a lay person, the services . . . involve activities, which when performed by a lawyer, may well involve the practice of law.").

16. N.Y. Ethics Comm. Op. 662, 1994 WL 120206 (N.Y. State Bar).

17. *Summerhayes*, 905 P.2d at 869-70.

18. *Id.*

19. We have held previously that a lawyer who practices a second profession will be subject to the ethical standards of a lawyer in both professions. *See* Utah Ethics Advisory Op. 5 (Utah St. Bar Jan. 13, 1972) (A practicing attorney who sells life insurance faces solicitation and conflict of interest problems and is held to the ethical standards of an attorney in both professions"). The ABA Committee on Ethics and

Professional Responsibility enunciated this same principle in Informal Decision 709 (1964) in response to the inquiry of a lawyer licensed as a real estate broker regarding ethical issues involved in receiving a real estate commission. The ABA Committee stated: "Although you have a real estate broker's license your letterhead indicates that you are engaged in the practice of law and are a member or associate in a law firm. A real estate brokerage business is so closely related to the practice of law that, when engaged in by a lawyer, it constitutes the practice of law."

20. *See, e.g.*, Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 *Hastings L.J.* 577 (1989); Louis M. Brown, *Emerging Changes in the Practice of Law*, 1978 *Utah L. Rev.* 599, 609; Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 *Case W. Res. L. Rev.* 531, 564-78 (1994); Susan Gilbert & Larry Lempert, *The Nonlawyer Partner: Moderate Proposals Deserve a Chance*, 2 *Geo. J. Legal Ethics* 383 (1988); Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* 804 (2d ed. 1990).

Rule Cited:

5.4