

Utah Ethics Opinions

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UTAH STATE BAR

Ethics Advisory Opinion Committee

Opinion No. 02-04

Issued March 15, 2002

¶ 1 **Issue:** May a lawyer, who is also a certified public accountant employed by an accounting firm, contemporaneously conduct from an office at the accounting firm public accounting services as an employee of the accounting firm and a law practice independent from the accounting firm without violating the Utah Rules of Professional Conduct?

¶ 2 **Opinion:** A lawyer who is a certified public accountant and employed by an accounting firm may not contemporaneously practice law and accounting from the offices of the accounting firm without violating Rule 5.4(b) of the Utah Rules of Professional Conduct. Accounting is a "law-related service," and, when accounting services are provided by an active lawyer, the lawyer is subject to the Utah Rules of Professional Conduct while engaged in either profession. The lawyer is, therefore, prohibited by Rule 5.4(b) from forming a business association with a non-lawyer to provide the accounting services when the lawyer is contemporaneously engaged in the practice of law.

¶ 3 **Factual Background:** A lawyer ("Lawyer") who is also a certified public accountant ("CPA") is employed by an accounting firm owned by other CPAs ("Accounting Firm"). Lawyer is an employee of Accounting Firm, but does not have an ownership interest in the firm. Lawyer desires to conduct the professional practices of accounting and law from his office at Accounting Firm. Lawyer will pay Accounting Firm rent for the fair market value of office space, computer and furniture, receptionist and other Accounting Firm resources used by Lawyer in the legal practice, calculated on an hourly basis. Lawyer will develop his own clients, but may accept referrals from CPAs employed by Accounting Firm. Lawyer will directly and separately bill clients for legal services performed, and will not pay any referral fees to Accounting Firm. Lawyer will maintain confidentiality of law client files by maintaining these files separately from the accounting files of

Accounting Firm.

¶ 4 **Analysis:** In the Committee's prior opinions, we have found that, under certain circumstances, a lawyer engaged in a law-related occupation will be subject to the Utah Rules of Professional Conduct while engaged in either occupation. (fn1) These opinions are consistent with opinions issued by the American Bar Association prior to its adoption of ABA Model Rule 5.7 in 1994. (fn2)

¶ 5 Model Rule 5.7 addresses circumstances under which a lawyer who provides "law-related services" is subject to the ABA Rules of Professional Conduct. Under the rule, if the services are not provided in circumstances that (a) are distinct from the lawyer's provision of legal services to clients, or (b) are provided by a separate entity, but the lawyer fails to take reasonable measures to assure that persons obtaining the law-related services know that the services of the separate entity are not legal services and that the protections of the attorney-client relationship do not exist. (fn3)

¶ 6 The Utah Supreme Court has not adopted Model Rule 5.7. While the Committee has noted that Model Rule 5.7 is consistent with its analysis in prior opinions, (fn4) the Committee has not endorsed the rule, as the decision to adopt any new rule is exclusively within the purview of the Utah Supreme Court. (fn5)

¶ 7 In our Opinion No. 98-08, we did use the definition of law-related services found in Model Rule 5.7(b) to find that accounting services are law-related services:

We note that an accounting firm fits the Model Rule 5.7 definition of law-related services as those that (a) might reasonably be performed in conjunction with, and in substance are related to, the provision of legal services, and (b) are not prohibited as the unauthorized practice of law when provided by a non-lawyer. (fn6)

¶ 8 In Opinion No. 98-08, the Committee concluded that a law firm could own an accounting-practice subsidiary staffed by employees other than the law firm's employees. However, the law firm's lawyers would be subject to the Rules of Professional Conduct in connection with the subsidiary's providing accounting services unless the law firm made reasonable attempts to inform the accounting clients that (a) they were not receiving legal services, and (b) they were not protected by the attorney-client relationship. Opinion No. 98-08 did not address the issue presented here of a lawyer who desires to practice law and public accounting contemporaneously from the offices of the accounting firm that employs the lawyer as an

accountant. (fn7)

¶ 9 Consistent with our prior opinions, we hold that the Utah Rules of Professional Conduct do not preclude a lawyer who is also appropriately trained and licensed practice public accounting from contemporaneously engaging in the occupations of law and public accounting. Accounting services are law-related services; hence, the work of the lawyer in the accounting occupation will inevitably include the practice of law. (fn8) Thus, a lawyer will be considered to be engaging in the practice of law while engaged in an accounting practice and will, therefore, be subject to the Utah Rules of Professional Conduct in the performance of both occupations. (fn9)

¶ 10 Because the standards of practice in the accounting profession may conflict with the Rules of Professional Conduct, simultaneous compliance may impose substantial burdens on the lawyer who provides accounting services. For example, accounting rules or principles may call for certain disclosures regarding a client for accounting services, while the Rules of Professional Conduct preclude such disclosures without the client's consent. The standards and rules governing the accounting profession regarding conflicts of interest may also be less demanding than Rules 1.7, 1.9 and 1.10 of the Rules of Professional Conduct. These burdens are, however, justified to protect a lawyer's clients from unethical behavior by a lawyer in the provision of legal services under circumstances where it is difficult, if not impossible, to differentiate the legal services from the law-related services of public accounting.

¶ 11 With this analysis as background, we address whether Lawyer, who is also a CPA and an employee of Accounting Firm, may contemporaneously provide accounting services as an employee of Accounting Firm and conduct a separate law practice from the offices of Accounting Firm. We hold that this arrangement violates Rule 5.4(b) of the Utah Rules of Professional Conduct.

¶ 12 Rule 5.4(b) provides: "A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law." Under the facts set forth in this opinion, Lawyer is engaged in the practice of law while providing the law-related service of accounting. Accordingly, Rule 5.4(b) precludes Lawyer from forming a partnership with a non-lawyer to provide the public accounting services. (fn10)

¶ 13 In Utah Ethics Advisory Opinion 00-03, the Committee noted that the purpose of Rule 5.4 is "to protect the lawyer's professional independence of judgment." (fn11) Recognizing that the wording of the rule addresses only a partnership, and that the request concerned the formation of a small business corporation between a lawyer and a non-lawyer, the Committee concluded that the small

business corporation posed the same risk to the lawyer's professional independence of judgment. We stated:

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. (fn12)

¶ 14 The employer-employee relationship between Lawyer and Accounting Firm creates no less danger to Lawyer's professional independence of judgment. Indeed, it can be argued that Lawyer's independence of professional judgment is at greater risk in the employee-employer relationship at issue than the equal ownership in a small business corporation addressed in Opinion 00-03.

¶ 15 In that opinion, the Committee concluded that a lawyer who was also a real estate title officer could not form a small business corporation (with equal ownership) with a non-lawyer to assist clients in challenging their real estate taxes without violating Rule 5.4(b). We stated, however, that the lawyer could form the small business corporation with a non-lawyer without violation of the Rules of Professional Conduct if the lawyer withdrew from the practice of law. In reaching this conclusion, the Committee cited with approval ABA Formal Opinions 297 and 239, which held that a lawyer could not enter into a partnership with an accountant to perform law-related services permissible for non-lawyers. (fn13) Also, ABA Formal Opinion 305 clarified that a lawyer could enter a partnership with an accountant to perform services permissible to non-lawyers if the lawyer withdrew from the practice of law and refrained from holding himself out as a lawyer. (fn14)

¶ 16 **Conclusion:** A lawyer may contemporaneously engage in the practice of law and public accounting from the same office, but will be required to comply with the Rules of Professional Practice in the conduct of both occupations. If the lawyer is employed by an accounting firm, his contemporaneous practice of law and public accounting from the accounting firm's office violates Rule 5.4(b). The lawyer may practice accounting as an employee of the accounting firm without violation of Rule 5.4(b) only if he withdraws from the practice of law and refrains from holding himself out as a lawyer.

Footnotes

1. 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).

2. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 328 (1972) (lawyer contemporaneously practicing law and accounting from the same office must conform to the Code of Professional Responsibility in conducting the activities of both occupations); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 709 (1964) (same for lawyer conducting real estate brokerage business from his law office).

3.

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

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

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

(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.

ABA Model Rules of Professional Conduct 5.4 (2001).

4. Utah Ethics Advisory Op. 01-05, at ¶ 7 n.6, 2001 WL 829937 (Utah St. Bar) (Model Rule 5.7 is consistent with prior opinions of the Committee holding that a lawyer engaged in a law-related occupation is subject to the Rules of Professional Conduct in both occupations.); Utah Ethics Advisory Op. 98-08, at 2, 1998 WL 716635 (Utah St. Bar) (same).

5. Utah Ethics Advisory Op. 98-08, at 3 n.5, 1998 WL 716635 (Utah St. Bar).

6. *Id.* at 3.

7. The issue presented here was also not addressed in Utah Ethics Advisory Op. 146A, 1995 WL 283828 (Utah State Bar). In that opinion, we held that a lawyer employed by a financial planner as its in-house lawyer could under certain circumstances provide legal services to the financial planner's clients independent of the financial planner. However, in Opinion 146A, the lawyer was not employed by the financial planner to provide anything other than legal services.

8. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 328 (1972).

9. *Id.*

10. Rule 5.4(b) has been criticized by some as being overly restrictive. We state no view on this because, as we have stated in a prior opinion, it is not within the authority of this Committee to amend Rule 5.4. Utah Ethics Advisory Op. 00-03, at n.20 & accompanying text, 2000 WL 347738 (Utah State Bar). Any amendment of Rule 5.4 must be submitted to and approved by the Utah Supreme Court.

11. *Id.* at 2.

12. *Id.*

13. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 297 (1961); ABA Comm. on Ethics and Professional Responsibilities, Formal Op. 239 (1943).

14. ABA Comm. on Ethics and Professional Responsibilities, Formal Op. 305 (1962).

Rules Cited:

5.4(a) Model Rule 5.7. (Utah has not adopted Model Rule 5.7.)