

Utah Ethics Opinion

2011.

11-03. UTAH STATE BAR ETHICS ADVISORY
OPINION COMMITTEE Opinion Number 11-03

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MAIN OPINION:

Issued November 15, 2011

1. ISSUE: Is it a violation of the Utah Rules of Professional Conduct for an attorney to ask a law student to undertake research using the law student's free account and in breach of the student's contract with Lexis and/or Westlaw?

2. OPINION: A lawyer who encourages or participates in a law student's violation of the student's contractual obligation to the electronic research service violates the Rules of Professional Conduct.

3. BACKGROUND: Certain electronic research services such as WESTLAW and LEXIS allow law students access to their services. That access is given to further the student's education. The student is required to sign an agreement that the services will be used only for educational or non-profit use.

For example, Westlaw limits the student's use to "Educational Purposes." That term means:

"If User is a career services personnel, Educational Purposes include Westlaw access and use solely for placement purposes. Any other use, including any use in connection with User's employment outside of the Law School and any Student internship or externship, is prohibited. Notwithstanding the foregoing, User may, however, access Westlaw by means of User's Law Student Password for purposes of unpaid public internships or externships (excluding those sponsored by a state or local government or a court. Any other use, including any use in connection with the employment or externship of User, if User is a student, is prohibited. . . .)"

Lexis defines appropriate use as:

"Students may request access to LexisNexis using their Law School Education ID . . . for academic purposes. Academic purposes include, but are not limited to:

Research skill improvement, such as improving research efficiency and sharpening your area of law research skills as

you prepare for practice

Summer School or course work

Work as a professor's research assistant

Internship or externship for school credit

Study for the Bar Exam

"Academic purposes" do not include research conducted for a law firm, corporation, or other entity (other than a professor or law school) that is paying the student to conduct research, or that is passing along the cost of research to a third party. These are deemed "commercial purposes." 1

Numerous students have reported that practicing attorneys have conditioned initial or continuing employment as a law clerk upon the student's violation of the agreement with the research services. In other instances, lawyers have knowingly used information retrieved from the electronic services in violation of the student's contractual agreement.

4. ANALYSIS: When a lawyer hires a law clerk, the lawyer is hiring the clerk for the clerk's services and not for access to the electronic database. The lawyer has no expectation that the law clerk will breach the contractual obligations for the benefit of the lawyer. Indeed, the lawyer's obligation is to make certain that the law clerk not violate any of the contractual duties and responsibilities.

5. Rules of Professional Conduct, Rule 5.3 place obligations on a lawyer supervising non-lawyer assistants. A lawyer with supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer. Further, the lawyer violates ethical obligations if the lawyer orders or with knowledge of the specific conduct (misuse of the electronic services) ratifies conduct of the non-lawyer which would be a violation of the lawyer's own ethical duties. Finally, it is a violation of Rule 5.3 if the lawyer knows of unethical conduct by the non-lawyer and does not take steps to avoid the misconduct or take reasonable remedial actions.

6. Misuse of the student's educational privileges is a theft of services. (Utah Code Ann. §76-6-409) The companies have specifically limited the use of their products to non-profit or educational uses. The lawyer hiring a law student has no reasonable expectation that the law student will violate her contractual obligation to refrain from the use of those services in a for-profit situation. A theft of services is a violation of Rule 8.4(b). It is a criminal act,

which, depending upon the amount of services wrongfully appropriated, could range anywhere from a Class B Misdemeanor to a Second Degree Felony. (Utah Code Ann. §76-6-412) Such a criminal act reflects adversely upon the lawyer's honesty if the lawyer specifically directs the student to violate her contract. It is also a criminal act and an ethical violation if the lawyer indirectly encourages the contractual breach through the coercion of the law student. See Utah Code Ann. §76-2-202 regarding criminal responsibility for the conduct of another person.

7. Requiring, encouraging or even tolerating the violation of the law student's contractual obligation to refrain from using the services for profit is also conduct involving dishonesty or misrepresentation. It therefore is also a violation of Rule 8.4(c).

8. Requiring, expecting or profiting from a student's violation of the contractual obligations is not protected by Ethics Opinion 98. That Opinion deals with the engagement of a third party to perform services for the client. The opinion specifically excluded conduct which amounts to dishonesty, fraud, deceit or misrepresentation by the attorney.

9. Misuse of the student's privileges is dishonest. Allowing, expecting or not rectifying the student's contractual breach of the contract violates the duty of supervision imposed upon the lawyer-employer.